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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 81

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

vs.

MRS. MYRTIS COOK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 9, 1929

CERTIORARI GRANTED OCTOBER 14, 1929

(34,194)

(34,194)

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

IN DISTRICT COURT OF HARRIS COUNTY, 61ST JUDICIAL DISTRICT OF TEXAS

No. 134,989

Mrs. MYRTIS COOK et al.

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.

PLAINTIFF'S ORIGINAL PETITION

From Transcript of Record from State Dist. Court, Filed Aug. 8, 1927

To the Honorable Judge of said Court:

Now comes Mrs. Myrtis Cook, widow, for herself and as next friend of Geraldine Cook, a minor, hereinafter called [fol. 2] plaintiff, complaining of and against Employers Liability Assurance Corporation, Ltd., hereinafter called defendant, and for cause of action represents to the Court:

I

That the plaintiff resides in Harris County, Texas; and that the defendant is a corporation created by the laws of the State of Massachusetts, and with a permit to do business in the State of Texas, and with an office and local agent in Harris County, Texas, to-wit, Rice & Belk, a partnership of which B. B. Rice and Craig Belk are the partners, and is engaged in the business of writing compensation insurance under what is known as the Workmen's Compensation Law in Harris County, Texas.

II

That Hal Cook was a machinist employed by the Ford Motor Company for a period of more than three years prior to January 26, 1927, and during that time was engaged in such trade or occupation, working on the construction of automobiles at the plant of the Ford Motor Company at Houston, Harris County, Texas, assisting in the construction of automobiles and various and sundry other work around the plant of said Ford Motor Company as a machinist.

III

That on or about the 26th day of January, 1927, said Hal Cook was employed by said Ford Motor Company, his said employer at that time carrying compensation insurance upon its employees, including the said Hal Cook, with the defendant Employers Liability Assurance Corporation, [fol. 3] Ltd., under and by virtue of the provisions of the Workmen's Compensation Act of the State of Texas that his said employer, Ford Motor Company, so carried said compensation insurance by a policy in writing and contract between the said employer and the said Employers Liability Assurance Corporation, Ltd.; and the defendant is here now giving formal notice to produce upon trial hereof the original of said policy or a duplicate original thereof, or its original memoranda thereof, and is further given formal notice that upon its failure so to do, secondary evidence thereof will be offered in evidence.

IV

That on or about the 26th day of January, 1927, while in the course of his employment, said Hal Cook was instructed by said Ford Motor Company to assist in unloading a ship or vessel belonging to the said Ford Motor Company, then anchored at the wharves at the Houston Ship Channel at Houston, Texas, and while so engaged said Hal Cook suffered severe injuries in that while he and other employees of the said Ford Motor Company were unloading from said ship the cargo thereon, consisting of axles and various other parts of automobiles and transferring the same to the wharves where said ship was anchored, the said

Hal Cook while lifting said automobile parts, received a severe strain to the internal muscles of his back and abdominal, and testical cavities, straining, tearing, and otherwise injuring the muscles, tendons and ligaments of his back, abdominal cavity, and testical cavity, which resulted in serious and permanent injuries to his back and abdominal and testical cavities, which totally incapacitated said Hal Cook from doing or performing any work thereafter, except very light work for a few hours thereafter, to-wit, [fol. 4] three or four hours. That said Hal Cook returned to his home and thereafter on the same day consulted a physician and was treated for the injuries so received, and within a few days thereafter was operated on for a varicocele vein, which did not relieve his pain and suffering, and thereafter consulted several other physicians and was treated by them and was taken to the Methodist Hospital in the City of Houston where he remained under treatment for approximately three weeks, after which he was carried to his home, at which place he died on or about March 28, 1927. That at the time of the injuries so sustained by the deceased, and at all times prior thereto, said deceased was in good health and sound in mind and body, and that his death was directly and proximately caused by the injuries so sustained by him, as above set forth. That from the time of the injuries to the time of his death, said deceased suffered constantly with severe pains in the lumbar region of his back and in the lower abdominal cavity, and testical cavity, which, within a few hours after said injuries were sustained, rendered his further working impossible.

V

Plaintiff would further represent to the Court that the defendant, Employers Liability Assurance Corporation, Ltd., was notified of the injuries received by the deceased, to-wit, on February 16, 1927, and prior to death of deceased, but said defendant failed and refused to pay said deceased anything as compensation for the injuries received by him and the consequent total disability he was suffering at that time and continued to suffer until the time of his death. That at the time said deceased received the injuries, as above set forth, he was regularly employed by the

said Ford Motor Company and was receiving wages at the [fol. 5] rate of *of* $6.80 per day for his services and had received said wages a long time prior thereto, and by reason thereof plaintiff herein, for herself and as next friend of said minor, is entitled to compensation for the death of said deceased at the rate of Twenty and no/100 Dollars ($20.00) per week for three hundred and sixty (360) weeks.

VI

Plaintiff alleges that within thirty (30) days from the date of the death of said deceased she gave notice thereof to the defendant herein and filed her claim for compensation for herself and said Geraldine Cook, a minor child of said deceased, with the Industrial Accident Board of the State of Texas, to-wit: On April 7, 1927; and that thereafter, after due notice to all parties at interest, and on May 18, 1927, the Industrial Accident Board made its final award, a copy of which award is attached hereto, marked "Exhibit A" and made a part hereof for jurisdictional purposes only; that thereafter, and within twenty (20) days after said final ruling and decision of the Industrial Accident Board, to-wit: On May 30, 1927, plaintiff, for herself as the surviving widow of said Hal Cook, deceased, and for Geraldine Cook, surviving minor child of deceased, notified the defendant, Employers Liability Assurance Corporation, Ltd., that she was not willing and did not consent to abide by the final ruling, award, and decision of the Industrial Accident Board of the State of Texas, made in said cause, as aforesaid, and this suit is now filed for the purpose of setting aside said award, final ruling, and decision of the Industrial Accident Board of the State of Texas, and to recover of and from the defendant, Employers Liability Assurance Corporation, Ltd., the compensation which this plaintiff claims [fol. 6] for herself, individually, and as next friend of Geraldine Cook, a minor, before said Industrial Accident Board, and now claims on account of the death of said Hal Cook resulting from injuries and disabilities above set forth which he received while in the course of his employment with the said Ford Motor Company.

VII

That the plaintiff, for herself and for Geraldine Cook, a minor, presented their claim for compensation before the

Industrial Accident Board of the State of Texas, and that said Board made a final ruling, award, and decision on said claim, and that within twenty (20) days after said final ruling and decision were made by the said Board, the plaintiff herein, acting by and through her attorney, mailed to the Industrial Accident Board at Austin, Texas, to the defendant, Employers Liability Assurance Corporation, Ltd., Houston, Texas, and to the Ford Motor Company, Houston, Texas, by registered mail, the following letter, which was received by them in due course of mail and within twenty (20) days after said final ruling and decision:

[fol. 7] "Houston, Texas, May 30, 1927.

H. Cook vs. Ford Motor Co. M-12196.
Employers' Liability Assurance Corporation, Ltd.,
Messrs. John L. Wortham & Son, Gen'l Agents.
Bankers Mortgage Building, Houston, Texas.
Ford Motor Company, Houston, Texas; Industrial Accident Board, Austin, Texas.

GENTLEMEN: You, and each of you, are hereby notified in accordance with Section 5, Part 2, Article 8307, Revised Civil Statutes of 1925, of the Workmen's Compensation Law of the State of Texas, that Mrs. Myrtis Cook, for herself and as next friend of Geraldine Cook, a minor, interested parties in the above entitled numbered cause, will not abide by the award, final ruling, and decision made by the Industrial Accident Board of the State of Texas, on the 18th day of May, A. D. 1927, wherein the said Industrial Accident Board denied the claim of Mrs. Myrtis Cook, surviving widow, and Geraldine Cook, surviving minor child of H. Cook, deceased, against the Employers Liability Assurance Corporation, Limited, insurer, on account of personal injuries suffered by said H. Cook, deceased, on or about the 26th day of January, A. D. 1927, while in the employ of the said Ford Motor Company, at Houston, Harris County, Texas; and that the said Mrs. Myrtis Cook and the said Geraldine Cook are interested parties herein and are not [fol. 8] willing and do not consent to abide by the final ruling, decision, and award of the said Industrial Accident Board of the State of Texas.

And notice is also hereby given by the said Mrs. Myrtis Cook, surviving widow, and Geraldine Cook, a minor child

of said H. Cook, deceased, that within twenty days from the date of service of this notice suit will be brought by the said Mrs. Myrtis Cook for herself and as next friend of Geraldine Cook, a minor, in some Court of competent jurisdiction in the county where said injury occurred to set aside the said award, final ruling, and decision of the said Industrial Accident Board of the State of Texas, and the trial de novo of said cause for the full amount of their claim, as provided for in said Workmen's Compensation Law, 1925, of the State of Texas.

Dated at Houston, Texas, on this the 31st day of May, A. D. 1927.

Mrs. Myrtis Cook, Individually and as Next Friend of Geraldine Cook, a Minor, by Sam C. Polk, Attorney of Record."

and defendant is here now given formal notice to produce the original of said letter and notice which was sent by registered mail and received by defendant, as aforesaid, upon trial hereof, and that upon its failure so to produce the same, secondary evidence thereof will be offered in evidence.

VIII

Plaintiff would further show to the Court that she was the wife and is the widow of said Hal Cook, deceased, and that Geraldine Cook is a female about eighteen (18) months of age and is the daughter of said deceased and plaintiff [fol. 9] herein and their only child, and that they are the nearest of kin of said deceased and are entitled to receive compensation for the death of said deceased; that by reason of the injuries sustained by the said Hal Cook, deceased, which resulted in his death, plaintiff and said Geraldine Cook, a minor, are entitled to recover of and from the defendant, Employers' Liability Assurance Corporation, Ltd., the sum of Twenty Dollars ($20.00) per week for the full, definite, and fixed period of three hundred sixty (360) weeks.

IX

Plaintiff would further show to the Court that in order to prepare and properly present her said claim to the said Industrial Accident Board, she employed Sam C. Polk, an attorney, to represent her; and the said named attorney did prepare and present her said claim and the claim of said

minor to said Industrial Accident Board, and that by reason of the award of said Board, denying to plaintiff and said minor any recovery as compensation for the death of said deceased, plaintiff has been compelled to employ said attorney to set aside said award and to prosecute this cause of action and to prosecute her said claim and the claim of said minor in this proceeding, and that she has so employed said attorney and has promised and is willing to pay him as his compensation herein and for his services rendered and to be rendered herein, one-third (⅓rd) of the amount recovered, and has by formal assignment and power of attorney secured him in the same, which said amount and interest in said claim, taking into consideration the services of said attorney before said Industrial Accident Board and before this Court, is fair and reasonable compensation for his services.

[fol. 10] Wherefore, plaintiff prays that the defendant be cited to appear and answer herein, and that upon trial hereof she have judgment setting aside the aforementioned award of the Industrial Accident Board, and for such compensation for herself and for said Geraldine Cook, a minor, to which she may be able to show herself and said minor justly entitled to receive under the law and the facts; and that her said attorney be protected in his interest in said claim and have the same set aside to him and judgment entered herein in his behalf for one-third (⅓rd) of the recovery herein, or for such other amount as to the Court may seem just and fair; and plaintiff further prays for interest, costs of suit, and for such other and further relief, general or special, at law or in equity, to which she may show herself justly entitled to receive.

Sam C. Polk, Attorney for Plaintiff.

EXHIBIT "A" TO PETITION

M-12196

H. COOK, Employee,

vs.

FORD MOTOR COMPANY, Employer; Employers' Liability Assurance Corporation, Ltd., Insurer

On this 18th day of May, A. D. 1927, after due notice to all parties at interest, came on to be considered by the In-

dustrial Accident Board claims for compensation made and asserted herein by Mrs. Myrtis Cook, surviving widow and Geraldine Cook, surviving minor child of H. Cook, deceased, against the Employers' Liability Assurance Corporation, [fol. 11] Limited, which have not been settled by agreement between the parties, and the Board now finds and orders as follows:

That said beneficiaries have failed to sustain the burden imposed upon them by law to establish to the satisfaction of the Board that H. Cook, deceased, suffered fatal injury and consequent death while engaged in the course of his employment in the capacity of employee for the subscribing employer herein, but to the contrary it has been made to appear that his death was due to a condition in no way incident to or associated with his employment, and therefore said claims for compensation must be and the same are hereby denied and refused and the said Employers' Liability Assurance Corporation, Limited, must be and is hereby fully and finally acquitted and discharged from all liability on account of the claims for compensation of Mrs. Myrtis Cook and Geraldine Cook, and it is so ordered, adjudged and decreed by the Board.

O. M. Duclos, Clerk District Court, Harris County, Texas, by A. W. Heinze, Deputy.

Filed June 15, 1927.

[fol. 12] IN UNITED STATES DISTRICT COURT

PLEA TO THE JURISDICTION AND ANSWER—Filed Aug. 31, 1927

To the Honorable said Court:

The Employers' Liability Assurance Corporation, Ltd., of London, England, defendant herein, files this its plea to the jurisdiction of the Court and says that this Court does not have jurisdiction of the cause of action asserted herein for the following reason:

I

This suit is brought by Mrs. Myrtis Cook, for herself and as next friend of her minor daughter, Geraldine Cook,

against this defendant to recover compensation under the Workmen's Compensation Act of the State of Texas, as beneficiary of Hal Cook, it being alleged in the petition that Hal Cook was an employee of the Ford Motor Company, and that he received injuries as an employee of the Ford Motor Company which directly resulted in his death; it being further alleged that the Ford Motor Company was a subscriber under the Texas Workmen's Compensation Act at the time of the alleged injuries received by Hal Cook and that this defendant had issued a policy of Workmen's Compensation Insurance under the Texas Workmen's Compensation Act insuring the employees of the Ford Motor Company under and by virtue of the terms of the Texas Workmen's Compensation Act.

This defendant avers that the Ford Motor Company at the time of the alleged injuries received by Hal Cook and for a long time prior thereto, was a foreign corporation, [fol. 13] organized and existing under and by virtue of the laws of the State of Michigan, that it was engaged generally in the manufacture and sale of Ford automobiles, parts and accessories thereto; that on January 26th, 1927, and a long time prior thereto, the Ford Motor Company conducted and operated branch offices in several states of the United States of America, including a branch office in the city of Houston, Harris County, Texas, where Ford automobiles were assembled and parts and accessories thereof sold.

On January 26th, 1927, and a long time prior thereto the Ford Motor Company owned and operated under United States Registry several ships, among which was the Lake Gorin, and were operated from the port at Detroit, Michigan, on the open seas and return, including the port of Houston, Texas; that these ships were owned and operated by the Ford Motor Company as a necessary and essential part of its business in manufacturing and selling automobiles, parts and accessories thereto; that if Hal Cook, deceased, received any injuries as set forth in plaintiff's petition, that the same were received by him while he was actually engaged in unloading the cargo on the ship, Lake Gorin, and while actually on said ship, and while the same was anchored in navigable waters of the United States of America at Port Houston, Harris County, Texas;

that the said ship, Lake Gorin, plied between the Port of Detroit, Michigan, and Houston, Texas, and that the particular cargo which the said Hal Cook was unloading at the time he sustained his alleged injuries originated in its home port at Detroit, Michigan, and destined to Port Houston in Harris County, Texas; that the said Hal Cook's employment expressly provided and contemplated that he should unload cargoes from ships owned and operated by [fol. 14] his employers, the Ford Motor Company, and that he was acting within the actual scope of his employment at the time he received his alleged injuries.

It, therefore, appears that Hal Cook, deceased, was engaged in the performance of a maritime contract and was actually aiding and assisting navigation and performing work of a maritime nature and the workmen's Compensation Act of the State of Texas is inapplicable and that the said cause of action is one within the exclusive maritime jurisdiction of the United States District Court.

Wherefore, defendant prays that this suit be dismissed for lack of jurisdiction and it recover all costs expended.

Without waiving the foregoing plea to the jurisdiction, but subject thereto, defendant for answer, if required, says:

I

It demurs generally to said petition because the same is wholly insufficient in law to state a cause of action against it, and of this general demurrer defendant prays judgment of the Court.

II

Defendant specially excepts to plaintiff's petition because it affirmatively appears that the alleged injuries sustained by Hal Cook, deceased, were sustained while he was engaged in the performance of a maritime contract and doing maritime work and was aiding and assisting navigation, and that, therefore it is a suit exclusively within the maritime jurisdiction of the United States District Court, and the Workmen's Compensation Act of the State of Texas upon [fol. 15] which the cause of action is asserted is inapplicable and invalid as in violation of Article 3, Section 2, of the Constitution of the United States of America.

III

For answer, if required, this defendant denies all and singular each and every allegation contained in plaintiff's petition, demands strict proof thereof and of this general denial puts itself upon the country.

Employer's Liability Assurance Corporation, Lt.', of London, England, by Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Be it Remembered, that on the 25th day of April, A. D. 1928, came on to be heard in regular order the above entitled and numbered cause, when came the plaintiffs, Mrs. Myrtis Cook, individually and as next friend of Geraldine Cook, a minor, in person and by her attorneys, and announced ready for trial; and also came the defendant, Employers' Liability Assurance Corporation, Ltd., of London, England, by its attorneys, and announced ready for trial; whereupon came a jury of twelve good and lawful men who were duly impaneled and sworn to try the issues in said cause, whereupon the cause proceeded to trial; and after the introduction of the evidence adduced by plaintiffs and [fol. 16] defendant and after argument of counsel, the Court charged the jury and submitted to them the issue of fact involved; whereupon the jury retired and on the following day, to-wit: April 26, 1928, returned into open Court their verdict, as follows:

"We, the Jury, find for the Plaintiffs.

(Signed) C. H. Menke, Foreman."

And it appearing to the Court from the pleadings, evidence and the verdict of the Jury that the plaintiffs are entitled to recover of and from the defendants as prayed, it is, therefore,

Ordered, adjudged and decreed by the Court that the plaintiffs, Mrs. Myrtis Cook and Geraldine Cook, a minor, do have and recover of and from the defendant, Employers'

Liability Assurance Corporation, Ltd., of London, England, a corporation, the sum of Seven Thousand Two Hundred ($7,200.00) Dollars, being the maximum amount allowed by the Workmen's Compensation Act of the State of Texas for death, to-wit: Twenty ($20.00) Dollars per week for the full, definite and fixed period of Three Hundred Sixty (360) weeks.

And it further appearing to the Court that Mrs. Myrtis Cook, for herself and as next friend of Geraldine Cook, a minor, entered into a contract in writing with Sam C. Polk, an attorney, to represent said plaintiffs before the Industrial Accident Board of the State of Texas in presenting their claim for compensation for the death of Hal Cook, and to file this suit to set aside the final award of said Board on said application, and agreed to pay said attorney one-third of the recovery herein, the Court is of the opinion, and so finds, that the compensation agreed [fol. 17] upon for the services of said attorney is reasonable and that said contract on behalf of both plaintiffs herein ought to be in all things approved, and that said attorney should be awarded one-third of the recovery, herein or the sum of Two Thousand Four *Four* Hundred ($2,400.00) Dollars; it is, therefore,

Ordered, Adjudged and Decreed by the Court that the contract of employment between Mrs. Myrtis Cook, for herself and as next friend of Geraldine Cook, a minor, with Sem C. Polk, an attorney, for professional services, be and the same is here now and in all things affirmed and approved.

And it further appearing to the Court that Geraldine Cook is a minor without a legal guardian and that said minor should recover one-third of the recovery herein, and that Mrs. Myrtis Cook should recover one-third of the recovery herein, and that Sam C. Polk should recover one-third of the recovery herein; it is, therefore, further

Ordered, Adjudged and Decreed by the Court that the amount recovered herein by Mrs. Myrtis Cook, Two Thousand Four Hundred ($2,400.00) Dollars, be and the same is here now ordered paid to her by the defendant in weekly installments of Six and 66⅔/100 ($6.66⅔) Dollars per week; that the amount recovered by the minor, Geraldine Cook, Two Thousand Four Hundred ($2,400.00) Dollars, be

and the same is here now ordered paid into the registry of this Court in the sum of Six and 66⅔/100 ($6.66⅔) Dollars per week, said payments to be made direct to her guardian when said guardian is appointed and has qualified; and that the amount recovered by Sam C. Polk as attorney for said plaintiff, Two Thousand Four Hundred ($2,400.00) Dollars, be and the same is here now ordered paid to him in weekly installments of Six and 66⅔/100 ($6.66⅔) Dollars per week; the payment of said weekly installments to continue for the fixed and definite period of three hundred [fol. 18] sixty (360) weeks from the date of this judgment, with interest on the respective amounts above set forth from date of judgment until payments are begun at the rate of six per cent per annum, said accrued interest, if any, and all past due weekly payments to be paid when payment of said weekly installments are begun.

All costs in this behalf expended are here now adjudged against the defendant.

For all of the above proper writs may issue. To which judgment defendant excepts and gives notice of appeal.

J. C. Hutcheson, Jr., Judge.

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed May 8, 1928

Comes the Employers' Liability Assurance Corporation, Ltd., of London, England and respectfully prays the Court to grant it a new trial for the following good and sufficient reasons:

I

Because there is no competent evidence in the record upon which to base a judgment in favor of the plaintiffs against the defendant.

II

Because the judgment is against the overwhelming preponderance of the evidence.

[fol. 19]

III

The Court erred in not instructing a verdict in favor of the defendant because there was no evidence of any pro-

bative force offered to show that the deceased, Hal Cook, received an accidental injury in the course of his employment.

IV

The undisputed evidence in the case showing that the primary cause of the death of Hal Cook was secondary anemia, and it being the contention of plaintiffs that the secondary cause was thrombus of the mesenteric veins caused and produced by a strain while the deceased Hal Cook, was unloading the ship Lake Gorin for the Ford Motor Company, the burden of proof was upon plaintiffs to establish by a preponderance of the evidence that the deceased, Hal Cook, did in fact receive or sustain thrombus of the mesenteric veins, and that the same was brought about or caused by strain while working for the Ford Motor Company, and there being no competent evidence in the record to show that the deceased, Hal Cook, did receive a thrombus of the mesenteric veins following a strain, the Court should have instructed a verdict for the defendant.

V

The Court erred in not instructing a verdict in favor of the defendant because there is no competent evidence in the record of sufficient probative force to warrant a finding that the deceased Hal Cook, received a strain while unloading the ship Lake Gorin which produced thrombus of the mesenteric veins causing his death.

[fol. 20] VI

The Court erred in refusing to give the following instruction requested by the defendant:

"Right in that line, Your Honor, I would like for the jury to be instructed further that if in the ordinary lifting, in the ordinary way in lifting parts, he strained himself, that would not be an accidental injury within the Workmen's Compensation Act, but that an accident implies a sudden, unexpected and fortuitous occurrence."

because under the Texas Workmen's Compensation Law, a strain received in ordinary lifting by reason of the work

itself, where nothing happened or occurred suddenly, unexpectedly and fortuitously, it would not be personal injury or accidental injury within the scope of the Texas Workmen's Compensation Act.

VII

The Court erred in instructing the jury as follows:

"I will refuse the charge and give just the contrary. If in the course of the operation he lifted and got a strain it is an accident, unless he got these strains every day."

because if the strain permits a recovery even though the deceased Hal Cook, strained himself in the ordinary manner and way of lifting without the happening of a sudden, unexpected and fortuitous event, and permits a recovery even though the deceased, Hal Cook, strained himself in lifting parts in the usual and customary way without any mishap of fortuitous occurrence.

[fol. 21]

VIII

In order for the beneficiary of Hal Cook to have predicated liability upon a strain, the burden of proof was upon the beneficiary to prove by a preponderance of the evidence, that at a time and place certain the deceased, Hal Cook, in attempting to lift an automobile part, slipped or made an unusual life or strain, or that there was some other unexpected and fortuitous event in the lifting and as there is no evidence in the record to show that the deceased, Hal Cook, did not lift the parts in the ordinary and usual manner and just as he expected and intended to do, and with no evidence in the record to show that he slipped or made an unusual strain at a definite time and place, there was no evidence in the record to show that deceased received an accidental injury and the Court should have, therefore, instructed a verdict for the defendant.

IX

The Court erred in not instructing the jury to return a verdict in favor of the defendant because under the undisputed evidence the said Hal Cook was engaged in a maritime contract and doing work of a maritime nature

at the time of the alleged injury, and, therefore, the cause of action would be exclusively within the maritime jurisdiction of the United States District Court.

X

The undisputed evidence showing that it was expressly provided in the contract of employment of the deceased, Hal Cook, that he should unload ships of his employer and that the unloading of ships was as much a part of his em-
[fol. 22] ployment and the duties of his employment as assembling automobiles and the undisputed proof showing that at the time of the alleged injuries he was in the performance of his contract in unloading a ship in navigable waters, and that it was absolutely necessary and essential to navigation that the ship be unloaded, and that, therefore, the said Hal Cook was engaged in the performance of a maritime contract and doing work of a maritime nature at the time of the alleged injury, and the cause of action was exclusively within the maritime jurisdiction of the United States District Court and the Texas Workmen's Compensation Act did not apply.

XI

The undisputed evidence showing that at the time the deceased, Hal Cook, sustained the alleged injury he was unloading a ship on navigable waters, and that it was absolutely necessary and essential to navigation and interstate commerce that the ship be unloaded and therefore, he was doing work of a maritime nature at the time of the alleged injury, and the cause of action was exclusively within the maritime jurisdiction of the United States District Court and the Workmen's Compensation Act did not apply.

Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

STATE OF TEXAS,
County of Harris:

Service and time of the within motion for new trial is expressly waived by the plaintiff and the plaintiffs acknowledge copy of said motion for new trial.

Polk & Allen, Attorneys for Plaintiffs.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEF'T'S MOTION FOR NEW TRIAL—Filed June 26, 1928

On June 2nd, A. D. 1928, came on for hearing Defendant's Motion for New Trial and the Court after having heard and duly considered the same, is of the opinion and so finds that the same should be overruled.

It is therefore ordered, adjudged and decreed that the Motion for New Trial filed herein by the Employers' Liability Assurance Corporation, Ltd., of London, England, be and the same is in all things overruled, to which action of the Court the defendant in open Court excepted and gave notice of appeal to the Circuit Court of Appeals, Fifth Circuit, at New Orleans, Louisiana.

J. C. Hutcheson, Jr., Clerk.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 11, 1928

To Mrs. Myrtis Cook, a femme sole; Geraldine Cook, a minor; Sam C. Polk and Polk & Allen, attorneys of record:

You and each of you are hereby notified that the Employers' Liability Assurance Corporation, Ltd., of London, England, defendant in the above entitled and numbered [fol. 24] cause, appeals from the judgment rendered in said cause against it in the United States District Court for the Southern District of Texas, Houston Division, in favor of Mrs. Myrtis Cook, a femme sole, Geraldine Cook, a minor and Sam C. Polk, to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

Dated this the 9th day of July, 1928.

Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared C. M. Hightower, who having been by me duly sworn deposes and says:

On the 9th day of July, 1928, at 12 o'clock, M., I served a true and correct copy of the within notice upon Sam C. Polk, of the law firm of Polk & Allen, attorneys for the plaintiffs in the above entitled and numbered cause.

C. M. Hightower.

Subscribed and sworn to before me this the 9th day of July, 1928. E. D. Adams, Notary Public, Harris County, Texas.

We, Polk & Allen, attorneys for plaintiffs in the above entitled and numbered cause, accept and acknowledge receipt of a true and correct copy of the within notice of appeal, this the 9th day of July, 1928, and hereby expressly waive any right to further notice of appeal by citation in error.

Polk & Allen, by Sam C. Polk.

[fol. 25] IN UNITED STATES DISTRICT COURT

NOTICE TO COURT THAT DEFENDANT APPEALS—July 11, 1928

To the Honorable J. C. Hutcheson, Jr., Judge of the United States District Court in and for the Southern District of Texas, Houston Division:

The Employers' Liability Assurance Corporation, Ltd., of London, England, the defendant in the above entitled and numbered cause, hereby gives notice that it appeals from the final judgment of this Court rendered against it in favor of Mrs. Myrtis Cook, a femme sole, Geraldine Cook, a minor and Sam C. Polk, which said judgment was rendered in the United States District Court for the Southern District of Texas, Houston Division at the February Term, A. D. 1928 of said Court.

Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 11, 1928

To the Honorable J. C. Hutcheson, Jr., Judge of the United States District Court in and for the Southern District of Texas, Houston Division:

[fol. 26] Now comes the Employers' Liability Assurance Corporation, Ltd., of London, England, the defendant in the above entitled and numbered cause, by Vinson, Elkins, Sweeton & Weems, its attorneys, and feeling itself aggrieved by the judgment of this Court entered against it and in favor of Mrs. Myrtis Cook, a feme sole, Geraldine Cook, a minor and Sam C. Polk, plaintiffs in said cause, on the 4th day of May A. D. 1928 in which said judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear in detail from the Assignments of Error which are filed with this petition, hereby pray that an appeal may be allowed to it from the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, to the District Court of the United States for the Southern District of Texas, Houston Division.

Wherefore, this defendant prays that an appeal may issue in this behalf out of said United States Circuit Court of Appeals for the Fifth Circuit for the correction of the error so complained of, and that a transcript of the record, proceedings and papers of this Court duly authenticated, may be sent to the said Circuit Court of Appeals, and that after due hearing there be judgment reversing the decree of the said District Court; that an order of supersedeas may be entered herein pending the final disposition of the cause, and that the amount of the security may be fixed by the order allowing the appeal, and that petitioner may have such other and further relief in the premises as may be just.

Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

[fol. 27] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BOND—Filed July 11, 1928

On this, the 11th day of July, 1928, came The Employers' Liability Assurance Corporation, Ltd., of London, England, defendant in the above entitled and numbered cause, and filed herein and presented to the Court its petition praying for allowance of an appeal and an assignment of errors intended to be urged by it; praying also that a Transcript of the Record, proceedings and papers upon which the judgment herein was rendered, duly authenticated may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, and that such other and further proceedings may be had as may be proper in the premises, and praying also that an order of supersedeas may be entered herein pending final disposition of the cause and the amount of security may be fixed upon order allowing the appeal.

On consideration whereof, the appeal is hereby granted and allowed to have reviewed by said United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, Louisiana, the said judgment rendered by the Court as aforesaid upon the giving, entering into and filing of the supersedeas bond in the penalty of Ten Thousand Dollars ($10,000.00) to be payable and conditioned as required by law, the said bond to be approved in accordance with the law. Upon the execution and filing of said bond, the execution of said judgment will be superseded.

J. C. Hutcheson, Jr., District Judge.

[fol. 28] IN UNITED STATES DISTRICT COURT

Bill of Exceptions

Be it remembered that on the trial of the above numbered and entitled cause, on the twenty-fifth day of April, 1928, the following proceedings were had, to-wit:

E. B. FLUKINGER, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is E. B. Flukinger. I live at 3414 Commerce Street, Houston, Texas. At the present time I am a bus driver for the Houston Electric Company.

In January, 1927, I was working for the Ford Motor Company. I did not have any regular job there. They switched me around.

On or about the twenty-fifth day of January, 1927, along with other employees of the Ford Motor Company, I was engaged in unloading a boat belonging to the Ford Motor Company containing parts. It has been so long now that I don't know whether we went down there to start to work that same night or not. I do not recall that at this time because we helped unload several. We went to work at different times every day.

I recall that Mr. Hal Cook was down there at work that night. We were working in the hatch. It was at one end, hatch one or four. I think we were working at one of the end hatches. We were unloading batteries and truck axles and such as that. They had a pan they would drop down there by a crane and we would load those batteries and rear axles or whatever was below out of the hatch. Mr. Cook was there that night engaged in doing that work.

[fol. 29] Mr. Cook did not continue to work all the time I was there. He quit before we finished. After we went down in there and worked a while he complained of his back hurting him, and we asked him how come he stayed down there.

We changed around all the time as to the man we worked with. These batteries come in crates and it would take two men to lift them and whatever men happened to be together would handle them. We swapped around. We did not have any real partners. We just swapped around in the hatch. In other words, no two men worked together all the time.

I do not remember whether I saw Mr. Cook when he quit work. I remember seeing him go out of the hatch. I do not know how come him to go out of the hatch, but I saw him when he was climbing up out of the hold.

He complained of his back before he left, before he went up out of the hold. We would say, "Cook, stand over to one side and don't work if you don't feel like it." And we

asked him how come he didn't go home. When he would stand up he would hold his hands on his hips like, on his back, standing up against the side of the hatch. When he left that was the last I saw of him, when he was climbing up out of the hatch.

I had known Hal Cook several years. I roomed at the same place he did one time. I would say that his age was around twenty-five; something like that. He was a little bit heavier built, I believe, than I am, and not quite as tall. Ever since I knew him he was a good and healthy, strong man, able bodied man. He worked all the time in the automobile plant of the Ford Motor Company. I never did know him to leave there sick or anything at any time. He was always healthy and worked every day that he possibly could. [fol. 30] I do not think Mr. Cook worked any at all subsequent to the time about which I have just stated when he was there on the boat.

The Ford Motor Company did not ask the men if they desired to do this extra work unloading these boats. They compelled us to do it. At one time they said the men that did not work on the boat did not have any job. It seems like they laid off a boy about a week because he was not there, a fellow by the name of Bradley. I went out there and unloaded those parts because they told me to go. I did not care for that kind of work. Naturally unloading those boats, that is a different kind of work from what I would like to do.

My regular employment was at the plant of the Ford Motor Company. I worked there about three years, I guess; something like that.

Cross-examination.

By Mr. Hightower:

All of us unloaded boats for the Ford Motor Company *Company.* We were required to do that under our contract of employment. That is correct. Each and every man under his contract of employment unloaded boats for the Ford Motor Company. We had unloaded several boats before that. I do not remember how long it had been from the time we unloaded other boats. I did not keep track of that.

It seems like the boat Mr. Cook and I were working on was the Lake Gorian. I am not positive, but it seems like

we started unloading the boat that night some time and worked through the night.

It was after we had worked there several hours that he complained that his back was hurting. We had been work-[fol. 31] ing there quite a while when he left the ship. I could not say just how long it was. It had been so long since this happened I could not give you an idea in hours.

I could not say what size ship that was. It was a pretty good size ship.

Mr. Cook at no time ever told me that he injured himself in any manner, shape form or fashion. After he worked down in the ship a while he just complained that he was sick and that his back was nearly killing him. Then after he started complaining he would hold his back with his hands every time he had a chance. I do not remember that he said his back was nearly killing him, just that way, but he said he was hurt or his back was hurting him, something like that. I could not say just what he said.

That is my signature. I made that statement and swore to it. That is correct the best I can remember. Since refreshing my memory by that statement, just like I say, I do not remember Mr. Cook saying anything but just what I have said before about his back hurting him. It seems to me like he said that he was sick and that his back was nearly killing him. He did not at any time that I remember ever tell me that he had received an injury to his back. I made that statement something like this: "We began working in the same hold when we started work. Some time after we went to work Cook told me that he was sick and that his back was nearly killing him." I remember them taking a statement from me at the plant just after it happened. I guess that is what Cook told me. I could not say it was not because it was fresher on my mind then than it is now. It was shortly after the death in April when I made that statement. My mind was more active of course then in regard to the facts than it is now. I do not believe he ever told me at any time that he injured himself. He went on out and we did not have to stop and talk.

[fol. 32] By the Court:

My regular work is on the line. When a ship comes in we go down and unload it. The part of the ship we unloaded was full of freight cargo, Part of it was for New Orleans.

It was all cargo for the Ford Motor Company. I never went in the other end of the ship. The work of unloading was done by the regular men. It was not done by the stevedoring crew at all. It was done by the men there at the plant. The stuff was lifted out of the ship by tackle. It was ship's tackle that we used. The ship's officers were not in charge of us in getting it out. The man in charge of us was a man working regularly at the Ford plant.

We were not paid any different or any more for that. We were just paid straight by the hour, just like we were at the plant. They just took us down there and unloaded the boat, and then we went back to the plant and went to work at the plant.

Redirect examination.

By Mr. Polk:

I was working at the Ford Motor Company at the time Mr. Hightower just asked me about.

When I made that statement I do not remember whether they took down my exact words. We talked about the work, and some fellow -rote [wrote] it down. I think that was some man representing the insurance company. The fellow asked me questions and I answered what I knew, and the other man would write it down.

[fol. 33] Dr. Raymond Dawes, a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

By Mr. Polk:

I am Dr. Raymond Dawes. I am a graduate of Dearborn Medical at Chicago. That was an accredited School of medicine at that time. It is not in existence now. It is P and S. I graduated from that school in 1907. I have been practicing the profession of medicine since that time. I have been engaged in the practice in the city of Houston since the fall of 1913. I have been in the general practice.

I had occasion to wait on and prescribe for Hal Cook in 1927, some time about January of that year. He was suffering a good deal of pain. He came to my office. I have a

copy of the prescription that I gave him. That is a copy of the prescription that I wrote for Mr. Cook when he came to see me. He was apparently suffering pain at the time he came to see me. He seemed to be suffering severe pain in the back here. I prescribed for him on that occasion. That was the thirtieth day of January, 1927.

The purpose of that prescription was to relieve his pain. I did not undertake to make a thorough examination of this man. I do not believe I saw him after that date. I just gave him a subsequent prescription for the same thing. The date of that prescription was February 1, 1927. It was an exact copy of the other prescription. That was two days after the first one.

Cross-examination.

By Mr. Hightower:

The date of the first prescription was January 30, 1927. I made just a cursory physical examination then; just felt of him, and then I took his history and asked him about his [fol. 34] pain in that way. The pain was so severe he said he could not stand it. I did not take his shirt off or his underclothes. That was not necessary in that case. All I wanted to get at was something to relieve the pain. The medicine I gave him was for the sole purpose of relieving pain. I never made any physical examination to determine any objective symptoms. I only went by his statement to me and his appearance.

AGREEMENT AS TO CERTAIN FACTS

It is agreed by and between the parties hereto that the following facts are true and that it will not be necessary to offer evidence to establish said facts:

(1) That the defendant issued policy of workmen's compensation insurance to the Ford Motor Company, which was in full force and effect on January 26, 1927, and prior and subsequent thereto, which covered the employees of the Ford Motor Company within the scope of the Texas Workmen's Compensation Act, and only such employees

as were within the scope of the Texas Workmen's Compensation Act.

(2) That the claim for compensation was filed within six months after the alleged injury, and notice of injury given within thirty days, and that all preliminary steps with respect to notice of claim, awarded by the Industrial Accident Board, notice of appeal and appeal were properly perfected within the terms of the Workmen's Compensation Act.

F. J. Reynolds, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is F. J. Reynolds. I live here in Houston. I am employed by the Ford Motor Company as chief clerk. I have been in that position four years.

[fol. 35] Hal Cook was an employee of the Ford Motor Company during part of that time. He was employed by the Ford Motor Company July 10, 1923. He remained in the employ of the Ford Motor Company up until about January, 1927.

I have the record of the ships that brought parts to the Ford Motor Company at Houston, Texas, from Detroit, Michigan. There were two boats, the Steamship Oneida and the Steamship Lake Gorian. The Oneida made five trips and the Lake Gorian made two. They made seven trips in all. The Oneida came here first. The date of her first trip was December 20, 1924. Subsequent to that time she came in January 18, 1925, and February 20, 1925, and March 23, 1925, and September 7, 1925. That is the Oneida.

The Lake Gorian came in December 16, 1926. Her next trip was January 26, 1927.

No other boats have come in subsequent to that time. The Ford Motor Company owns those boats. Those boats did not bring any other cargo to Houston other than material or parts for the Ford Motor Company for Ford automobiles.

The first boat was unloaded by Ford Motor Company employees. All those shipments were unloaded by Ford Motor

Company employees, according to my recollection. The first ship was unloaded by Ford men, and, as I said, as far as I can recall all of them were unloaded by Ford men.

Hal Cook received four rates of pay out there. The first rate was 62½ cents an hour, and he was advanced to 75 cents an hour, advanced to 80 cents an hour, and advanced to 85 cents an hour. He was receiving 85 cents an hour at the time of his last employment. He had been receiving that rate since December 9, 1926. Those men were paid the same rate of pay for unloading those boats down there.

We were working the men in two shifts, and when they were sent to work down there, instead of reporting at the plant the men were instructed to report to the ship.

[fol. 36] Mr. Cook worked at the plant on the day of the twenty-fifth eight hours. I cannot tell from this card when he started to work on the twenty-fifth. I do know he worked twelve hours on the twenty-fifth.

AGREEMENT AS TO CERTAIN FACTS

It is agreed by and between the parties hereto that Hal Cook was receiving a salary at the time of his death that would entitle him to receive the full compensation allowed by the Workmen's Compensation Law, if he is entitled to recover.

When a man is employed by the Ford Motor Company he signifies by signing an employment slip that he is open for any kind of work. That did not necessarily mean any kind of work around the plant. That meant any kind of work within the jurisdiction of the Ford Motor Company. If they wanted to send him out on the road they had the right to do that.

Cross-examination.

By Mr. Hightower:

The home office of the Ford Motor Company is at Detroit, Michigan. It has two boats of its own, the Lake Gorian and the Oneida, that it has owned since 1924. It uses those

two boats on the high seas plying from their home port of Detroit, Michigan, to any of its various branch plants. Those boats were used for that purpose in the winter of 1924. I mean as far as southern trips are concerned. In the summer they were used for the same purpose in the north. They came to Houston. They were used exclusively and continuously by the Ford Motor Company on the high seas.

This ship was anchored at the municipal docks. The Ford Motor Company did not own the docks that that ship was tied into. Other ships would berth there and unload [fol. 37] cargo, other ships engaged in international commerce and navigation. I do not know the number of the dock this ship was tied up to.

It was a part of Mr. Cook's employment and a part of his contract of employment to assist in unloading cargo off these ships, and he did perform that service for the company. I do not know if Mr. Cook performed that kind of service on the trips of the Oneida, but he handled that kind of work on the first trip of the Steamship Lake Gorian, and also on the second trip of the Steamship Lake Gorian.

Those were self propelled ships. The crew of the ship was in the employ of the Ford Motor Company. There were captains and mates and such as that on those ships, who were in charge of the ships. They were in charge of both ships while they were in Houston, and had charge of the cargo, getting them unloaded and returning with the ships to the home port of Detroit.

Redirect examination.

By Mr. Polk:

The foreman was sent along in charge of those men when they went from the plant.

Mrs. Myrtis Cook, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is Mrs. Myrtis Cook. I live at 323 North York Street, Houston, Texas. I am the wife of Hal Cook.

Mr. Cook died March 28, 1927. Mr. Cook and I were married on February 7, 1925. We have one child. That child is a girl, and she is two years and five months old. [fol. 38] I am employed now. I work for the Star Engraving Company, in the stationery department.

I recall the circumstance of Mr. Cook's going to work on the night of January 25, 1927, to unload this boat down there. I met Mr. Cook at the Ford plant at 4:30 that afternoon. That was the time the employees got off. Then we went home.

When I met Mr. Cook he said he had to go back to work at 12:00 o'clock. In preparation for going down to the boat that night he went to bed and set the alarm clock. He got up at 11:00. He got up at 11:00 so he would have time to take me and the baby over to my mother's and then go to work.

Mr. Robertson and Mr. Simmons were going with him that night. Mr. Robertson is now dead. Mr. Robertson is the man who, with his wife, was drowned last summer.

I next saw Mr. Cook the next day at 12:00. He came home. He came home that day in pain with his back. When he got home he lay on the bed. He ate very little dinner. He complained all afternoon, and he wanted to go back to work that night, and he set his alarm to get up again, but he did not sleep any, and he did not go back to work. When 11:00 came he was not able to go. He never did go back to work after that night.

The first time he went to see a doctor was a few days after that. I do not know whether he went to see the Ford plant doctor before he went to see Dr. Dawes or not. The Ford Company had a doctor there at the plant. He had offices there at the plant for the purpose of rendering first aid to the employees. I do not know whether Mr. Cook went down to see him or not. I do not remember whether he went to see him before he went to see Dr. Dawes or not.

I took Hal to Dr. Dawes in the car. I heard Dr. Dawes testify about him being there on January 30. I took him [fol. 39] down there at that time. Mr. Cook was suffering at that time and getting worse. He was suffering pain mostly in the back, and pains in the front part of his body. He could not sleep during that time unless he had narcotics from the doctor. When he got this prescription from Dr.

Dawes he was able to sleep when he was under the influence of it. It was then necessary to get another prescription because the first one was not doing him any good after he took it a while. It did not relieve his pain, and so the next day, I think the first of February, a few days later, my brother-in-law and I went to Dr. Dawes and got a prescription, a double prescription. He said it was stronger.

Dr. Whitehouse, the Ford Plant doctor, came out to see Mr. Cook, but Hal went to him first.

An examination was also made of Mr. Cook by Dr. Hill down town here. Dr. Whitehouse sent us up there for that examination. He just wanted Dr. Hill to examine him. Mr. Cook could not drive the car. I helped him to the Post Dispatch Building. That is where Dr. Hill's office is. He had to be given some support at that time. I helped him. He complained of suffering at that time.

Dr. Whitehouse had told Hal he wanted to take him to Jefferson Davis Hospital and operate on him varicocele, varicose veins. Dr. Hill examined him and told him that was the best thing he could do. After that examination I took him back to Dr. Whitehouse. Dr. Whitehouse told him he could not give him anything until 4:30. He said if he would go on home when he got off at 4:30 he would come by there and give him a hypodermic and ease him until the next morning. He was going to take him to the hospital the next morning.

We did not go to another doctor until after Dr. Whitehouse came by that evening. Then we went to another doctor. We went to Dr. Carl F. Barnes. His office is in the [fol. 40] Kress Building. We called Dr. Barnes that night and he came out early the next morning. He said that he would operate on him at home, and that he would be back the next morning, but he came back in the afternoon. That was the same day, the eleventh of February.

He operated on Mr. Cook. He did not get better. He got worse. He was operated on on the eleventh day of February, and he stayed at home, and we took him to the Methodist Hospital on the first day of March. He was at home from the time of the operation up to the time we carried him to the Methodist Hospital. After he was operated on he was not up and could not walk. He got up in his night clothes, and his brother and I helped him in

the car, and I took him to my mother's because I did not want to stay there by myself with him. That was about three days before March 1, which was the time he went to the hospital.

He stayed at the hospital from the first day of March until the twenty-third day. We took him home then because he wanted to go home so bad, and Dr. Barnes said he could not get well, and so he let him go home. He died March 28. That was Monday morning, at 10:20.

I had known Mr. Cook two years and four months prior to our marriage. He was six feet tall and weighed 165 pounds. He was engaged in his employment continuously over there at the Ford Motor Company. Mr Cook was never sick while I lived with him prior to that time. He had a cold once in a while, but he never missed any work from being sick. Mr. Cook did not have any blemishes. He was in perfect health. I do not know of his ever being ill prior to the time I met him. He never stated that he had suffered any accidents or anything of that sort.

[fol. 41] I do not know what character of medicine was given him during all the time, both prior and subsequent to the operation for varicocele veins, and out at the hospital. All the prescription said was to relieve pain.

Cross-examination.

By Mr. Hightower:

My husband never got better from the time he was operated on up to the time of his death. He gradually grew worse from the time of his operation until his death.

J. A. Petrosky, a witness in behalf of the plaintiffs, testified as follows:

By Mr. Polk:

My name is J. A. Petrosky. I was employed by the Ford Motor Company in 1927. I had been employed there possibly about four years. I was working on the rear axle station on the line out there, the construction line, what they call the assembly line.

I knew Hal Cook. I worked about four cars from him on this assembling line, the width of four cars. He worked about four cars from me on a radiator station. I could not say what he had been doing on the crew, but he was working around the radiator station. He had been working there longer than I had. I worked there right around four years. He had worked there longer than I had. I knew him during most of the time I was there and saw him there while we were working. He was a man about six feet tall, and weighed about 160 pounds as close as I can remember. He was a pretty well built man. He never lost any time [fol. 42] from ill health or anything of that sort that I know of. He was always working and never complained that I ever heard.

On the night of January 25, 1927, I was called on by my employer to go down and unload a boat. I do not recall the name of that boat. I worked at the plant during the day. I quit work there at 4:30. I was instructed to go to the Turning Basin and unload this boat at 12:00 o'clock that night.

I saw Hal Cook there that night. He and I worked in the same hatch. That was number one hatch. That was in one end of the boat. I think there were four hatches on the boat, two on each side. Number one hatch is right in the head end of the boat. Number two hatch would be the closest to the shore. That would be more in the middle of the boat. The side of the boat was up against the wharf in that manner.

We were unloading all kinds of parts, axles, front axles, springs and small parts. There were also batteries in there, and rear axles. Those batteries were loaded four or five in a crate. I could not say how much they weighed. They would weigh approximately between 100 and 125 pounds. They were crated length ways, five batteries in a length. I suppose those rear axles would weigh about 200 or 250 pounds. It took two men to handle them, one man on each end of the axle.

Cook went in there the same time I did to work, and he stayed in there an hour or two hours, something like that, before I missed him, and he was complaining with his back. He said his back was hurting him so bad that he thought he would have to go home, and he went up to see

his boss. I heard him state that about his back hurting him. He was talking to me at that time when he complained [fol. 43] of his back. He was standing up there holding his hand on his back. He had both hands in the small of his back like that, and said his back was hurting him. He seemed like he did not have any get-up about him. He went on deck, and I did not see him after that.

I saw him after that before he died. I saw him at the hospital. I suppose that was a couple of weeks before he died. I could not state just when it was, but it was before he died though.

Cross-examination.

By Mr. Hightower:

I was working right there with him unloading that boat. The only thing I ever heard him say was that his back was hurting him. I never did hear him complain or say anything about receiving an injury of any kind or character. I never did hear him say that he received an injury of any kind or character while I was working there.

Roy Simmons, a witness in behalf of the plaintiffs, testified as follows:

By Mr. Polk:

My name is Roy Simmons. I live here in Houston. I am employed by the Gibralter Savings and Building Association. In January, 1927, I was employed by the Ford Motor Company. The nature of my employment was just general mechanical work. I was working on the assembling line.

I was from time to time stationed close to Hal Cook. I was stationed close to him in December and January prior to his death. It seems like we laid off on the day of January 25 and went down to the boat. I do not remember whether we worked that day or not.

[fol. 44] Mr. Cook and Mr. Robertson and I went down to that boat together. We went in Mr. Cook's car. Mr. Cook did not complain going down there that night of any injury

or anything of that sort. He seemed to be in his usual good health and good spirits.

After we arrived at the boat I did not work in the same place Mr. Cook did. I worked in a separate hatch. I next saw Mr. Cook after we had gotten down there after we had gotten off at 12:00 o'clock the next day. Mr. Robertson and I came back with Mr. Cook.

I went back to the boat that night myself. I was to come by in my car after Mr. Robertson and Mr. Cook. I was to go back with them the following night. I went by Mr. Cook's house that night. Mr. Cook did not go with me. Mrs. Cook came to the door and said Mr. Cook was not able to go; that he was complaining about his back.

Mr. Robertson and I then went on down to the ship. We worked after we got there. I believe we worked the whole shift. I think we both did. I am sure we did.

I never did see Mr. Cook at work after the time I have just mentioned. I went to the hospital to see him once or twice. He recognized me all right and spoke to me. That is after I had held my hand out. He shook hands with me, and I asked him how he was feeling, and he said, "Well, I am awful sick," and after that he turned over and apparently went to sleep, and I tip-toed out of the room.

D. H. Hotchkiss, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is D. H. Hotchkiss. I am superintendent of the Methodist Hospital, and have been for two years or more. [fol. 45] This is the permanent record of the hospital with reference to the case of Hal Cook. That is a complete record so far as we have it.

Cross-examination:

By Mr. Hightower: That is everything we have.

Dr. C. V. BARNES, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

I am Dr. C. V. Barnes. My profession is the practice of medicine and surgery. I am a graduate of the Memphis Medical Hospital, and Polyclinic at New Orleans. I graduated at the Memphis Medical Hospital in 1902, and at New Orleans in 1907 and 1910. I hold certificate of graduation from New Orleans. I have practiced my profession since the time of my graduation from Memphis and New Orleans. I have been practicing in the city of Houston six or seven years. I am in the general practice.

I was called to wait on Mr. Hal Cook. I do not remember the name of the street where I first saw him, but it was out toward the car barns. It was at his home.

The man was suffering excruciating pain when I saw him, pains that started somewhere in the abdomen and went downward and settled in his testicles. That is the way he expressed it. The left testical was affected. The testical was slightly swoolen [swollen]. There was a varicose condition in the scrotum.

I operated on him and removed a section of the vein. That operation healed up properly. I do not know how long it took for that to heal. It healed in about the ordinary time, seven or eight days; something like that.

[fol. 46] After I operated on this man I continued to go to see him. For about two or three days the man got relief. After that the pain came back just as severe as it ever was, if not more so. For about two or three days the man seemed to have gotten relief from that pain, but after that it was just as severe as it was before, if not more so. The man complained all the time of suffering pain in the abdomen; that is, somewhere in about this place, and that pain would go downward toward his testicle all the time. The pain he said would start on the inside and go down and settle in his testicle.

When I first made an examination of this man he was suffering pain. He told me at that time what he considered was the matter with him. He said he was working unloading some parts to a car, axles, if I remember cor-

rectly, and that he felt something give way on the inside of him, is the way be expressed it, and he suffered pain and felt fainty, and I think he told me he asked his boss something about it and he let him on some lighter work that night, and from then on he had pain. That is about what he told me.

Mr. Hightower: Your Honor, we ask the Court to instruct the jury that anything that the deceased told him as to how he might have been injured would not be admissible as evidence, but simply as the hypothesis upon which he might base a conclusion or medical opinion.

The Court: The jury has a right to consider the doctor's opinion in the light of what the man said occurred. The statement of the history is not independent evidence of the [fol. 47] fact. The matter will not be considered by the jury as evidence of the fact, but as evidence upon which the doctor based his opinion.

The Witness: After I had operated on him for this varicose vein and had removed it I found it necessary to remove him to the Methodist Hospital for the purpose of giving him better treatment out there and seeing him oftener each day. I suppose I saw him on an average of twice a day during the time he was out there. I think one day I went five times.

I was of the opinion that he was suffering from thrombosis of the mesenteric vessel, a blocking of the mesenteric vessel that supplies the parts on the inside. Thrombosis means a clotting or blocking. The mesenteric veins supply the intestines and supply the parts on the inside of the body. That is a part of the circulation system on the inside of the body. By thrombosis of the mesenteric veins I mean a clogging up of those veins.

The man finally died, of secondary enemia. That enemia is a breaking down of the blood cells, the life giving cells that supply the body. That is about as plain as I can make it. Very likely that thrombosis caused this enemia, the blocking up of those vessels.

I cannot tell you what caused that thrombostic condition. My idea is that it was that strain, that lifting, just like the blood vessels anywhere else, in your head or any other part of your body. That is my judgment, that it was a ruptured blood vessel.

A strain, something like that, lifting, will cause varicose veins. That is one of the most prevalent causes.

My treatment for this man was to give him something to ease him. I am not sure whether he had any X-ray pictures made of him or not. I do not think we did. I do not [fol. 48] see anything about them. An X-ray picture is useful in case of a fracture or a bone and in other cases. It would not indicate a blood clot unless it were stained with something. I do not see any X-ray pictures on this chart. Blood counts were made. There were five blood counts made. The percentage of blood was down to 48 of the total volume of the blood, based on a full amount of 100. 100 is figured as standard. That was on March 11. That indicates that the red corpuscles were breaking down. That was the last pathological test that was made on the percentage of the blood.

When a man loses blood he becomes pale and becomes slightly jaundiced or yellow because he has not enough red blood cells to make the red color. He loses weight.

This patient continued to lose weight. He was not weighed, but he continued to lose, by the looks of him.

The record shows that he stayed there from the first of March until the twenty-third of March. It was my judgment when he went home that he could not get well. That was my idea about it. He died fifteen days after that.

I did not see him from the time he left the hospital until he died. The undertaker called me to make out the death certificate. I never saw him after he left the hospital.

I presume these hospital charges here are reasonable. Three dollars a day for that charge there is a reasonable charge. I prescribed a lot of drugs and medicine for him to take out there. There were not so many bandages. He took quite a number of hypodermics. There were surgical dressings and things of that sort. I could not tell you a thing in the world about the charges for pathological tests.

[fol. 49] Cross-examination.

By Mr. Hightower:

It is my conclusion that following this operation a blood clot was torn loose and went into the mesenteric veins, from secondary anemia. I operated on him for what is

commonly known as varicocele. That is the big vein leading from the scrotum up.

All the veins in a man's body lead toward the heart. I operated on the varicose vein down in the scrotum.

The spermatic vein is one of the veins supplying the spermatic cord. It leads from the scrotum up. That vein goes into the vein leading right up there. It goes into the general circulation. The vein goes from the scrotum where I operated on up and goes into the renal vein finally. The spermatic vein is the one that leads from the scrotum where I operated on Mr. Cook on up directly into the renal vein. The renal vein leads into the vena cava, a large vein that leads up into the right heart. After it gets into the right heart it is pumped out then into the lungs, and then after it starts back out of the lungs they branch off again.

On the chart you have there the spermatic vein is accurately drawn, going on up and going into the renal vein. The vena cava is shown correctly there going upward. That is a correct sketch. That goes into the general circulation.

When this man came to me he had varicocele. I could absolutely tell from my diagnosis that he was suffering from varicocele.

Different things cause varicocele. Anything that will block up that vein will cause varicocele. Anything that will block that little channel that the blood goes through will cause varicocele or that varicose condition. The vessels become hard and the channel becomes smaller. It [fol. 50] does not make any difference what produces the smallness of the channel, if the channel gets smaller it is going to stagnate.

I understand hemorrhage of the tissues, blood getting out in the tissues.

The veins leading upward toward the heart get larger and larger. Following this chart, if an embolus were torn loose down here as I have stated to the jury it would start up in that spermatic vein. It would go on up that spermatic vein and go into the renal vein. That vein, as it leads on up, gets larger. An embolus would not get to the heart through that. I am of the opinion that an embolus would not go through a kidney and go through the heart. In all probability it would stop somewhere up in here. I know the spermatic vein leads directly into the

renal vein. It leads on into the kidney. As it goes up toward the renal vein the spermatic vein gets larger.

If an embolus were torn loose down in the varicocele vein its course would go up through the spermatic vein. As it went up that vein in the general direction of the heart that vein would get larger. It would be larger where the spermatic vein went into the renal vein. The renal vein is larger than the spermatic vein. The renal vein then leads into the vena cava. The embolus then would have freer transportation and a freer course from the renal vein into the vena cava than it would in its beginning down here. When it got into the vena cava, the large vein there, it would still have a freer course because the vein would be getting larger all the time.

The veins leading from the right heart are the pulmonary veins.

The embolus that we have traced would have a larger course all the time until it got into the right heart.

[fol. 51] I did not say in the first place that this thrombosis got into the mesenteric veins. I do not think I testified that. A thrombosis is stationary. An embolus is something that is washed off from a thrombosis. An embolus floats in the blood vessel and a thrombosis does not. A thrombosis is a blo-d clot which is stationary.

This man's red blood percentage before I operated was 82 per cent. I had no blood count immediately before the operation. That was when he went in the hospital. I operated on a man without knowing his blood count. That record does not show the blood count of Mr. Hal Cook before he was operated on. It is not almost imperative to take a blood count of a man before you operate to determine whether or not there is any primary trouble. That is at the option of the doctor.

Before I operated on this man he was complaining of suffering pain. He was complaining of pain in the abdomen, abdominal pain. He also gave me a history of how he was injured. I operated on him for varicocele without determining whether or not there might be a thrombosis of the mesenteric veins.

By secondary anemia I mean coming on after some other trouble, following in the wake of some other trouble. The secondary anemia came on a few days before his death.

I do not have any record of when I first examined him. It was a few days before he went to the hospital. I operated on him the next day after I examined him.

I think I have seen in the text books that a strain will produce varicocele. Where we have a varicose condition we may not have an acute condition at the time. A direct blow that would produce thrombosis would produce peritonitis in all probability. You might have gangreen-. If a man should receive a strain that would produce thrombosis very likely it would be sudden and severe. If he had a [fol. 52] direct lick sufficient to rupture the mesenteric vessels there is no doubt but what it would bring about acute peritonitis. If he had been struck in the abdomen or something like that he would very likely have had peritonitis following, but he would have to get an infection from somewhere to get peritonitis.

Thrombosis is a blood clot. That is all there is to it. There are several ways it can be brought about. A hypodermic injection in the vein can cause thrombosis. I say that a sudden strain can cause thrombosis of the mesenteric veins. I do not believe it will hold true all the way along the line that a sudden strain sufficient to produce thrombosis of the mesenteric vein would cause an acute peritonitis in four or five hours. It can cause it, but you have got to get infection there. If you have any medical authority that teaches differently I would like to see it. I will not put myself up against a medical authority. It [if] it is in the book I will take it in preference to my own opinion.

This chart indicates that Mr. Cook's temperature became elevated after the operation. Temperatures are usually caused from infection. That would indicate that following this operation infection set in.

In the death certificate I say that the primary cause of death was secondary enemia. That is loss of red blood corpuscles. It is a breaking down of the red blood corpuscles. Anything that will lower the vitality of the body could have a connection with secondary anemia. Infection following this varicose operation would cause secondary anemia, but he was not infected. It would cause it. The chart indicates that there was infection somewhere within that body.

I cannot say whether an injury of any character had anything to do with this death. I cannot say that it was the

cause of it or was not. I only took the history of the man.

[fol. 53] Redirect examination.

By Mr. Polk:

Assuming to be correct what the deceased told me, that he was lifting something out there on this boat, and that he felt something tear loose inside, and that was the history of the case so far as I knew it, it would logically follow as a pathological proposition that this could happen.

The primary healing of that operation was all right. It healed up primarily just like all wounds heal up. I cannot see why that could have caused this condition. I cannot see any reason why it could have.

It would be my diagnosis that this strain was the primary cause of this man's condition, that he did rupture one of those vessels—which one I do not know—but he had symptoms of a ruptured vessel.

This man had hemorrhages during the time I was waiting on him out here at the hospital. He had hemorrhages through the bowels. That would logically follow the rupture of a blood vessel inside.

During the time this man was in the hospital I called in other physicians in this case in consultation, Dr. De Walt and Dr. Kuebler, and Dr. Hayes, and Dr. Priester saw him. I called them in because it was an unusual case to get their opinion. After having those consultations with those doctors I did not have any reason to change my treatment of this case.

By the Court:

Anemia does not mean to starve to death. It means to starve to death, but not for lack of food, but because the body was not properly performing the function to take out of the food the nutritive value and spread it through the [fol. 54] system. It is not starving in the sense that the body could not get food, but in the sense that the body could not use the food. That condition that I called secondary anemia was just the days before he died. His body was just breaking down. We did not find any typhoid. My diagnosis was that he did not die from any of the different germs or different cocchi.

The condition I operated for was simple varicocele. I never heard of anybody dying from varicocele. It is an enlarging of the veins that supply the testicles and makes a knotty growth around the vein. A strain, standing on the feet and such as that might cause it. Over sexual indulgence or sexual abstinence might cause it. I do not know that I ever saw any text books on that, but I think it would have some bearing on it. The varicose veins that you have in your legs are not any different, only in a different place. You can get varicose veins from a strain or standing. When you find varicose veins it is ordinarily a condition of long standing. About 60 per cent of the men have varicose veins.

I believe from this history this man gave me he had a ruptured mesenteric vessel. There is a difference between a ruptured mesenteric vessel and varicocele. They are different veins altogether. He had varicocele, and I think he had this other besides. I really do not think the varicose condition had anything to do with his death. I think it had nothing whatever to do with his death. It was not sufficient to cause his death, unless by reason of the operation he got some infection, which he did not get. I do not believe I ever heard of a man dying from an operation for varicocele.

I determined that there was apparently a th-omboid condition there from the history of the case. The man gave a history of a fainty condition when he first became injured, [fol. 55] got fainty and thirsty for water, like anybody who has lost blood, and I connected that up with the instant pain that he had, radiating down in the pelvic region, following where those vessels would go.

I would not think that varicose condition had anything to do with that. That was just a coincidence, something coming along with it. That is what I think about it.

His temperature rose just about the time he was passing blood. His temperature came up when he was passing large quantities of blood. My deduction is that that was caused from severe inflammation of the bowel wall, the little capillaries supplying the bowel becoming so saturated and breaking through and filling the bowel[l] [bowels] up with blood. That was about ten days after he claimed to have been injured. That is one reason that I made the diagnosis that I did. The blood vessels dam up and that is nature's

remedy to try to relieve the congestion. That is my belief about it.

If he had not given any history of having received any strain at all I would have said I did not know what in the dickens was the matter with him. When he gave that history of a strain that made a satisfactory reason for the conditions I found. It does look like to me, with a man giving a history of lifting something, turning sick at the stomach, fainty like, and wanted water and had to have water right away, there was something happened like the rupture of a blood vessel and loss of blood. That is the way it looks. That is the history I took of him.

[fol. 56] Recross-examination.

By Mr. Hightower:

The thrombosis would not happen right now. It could not come on directly because the blood has got to have time to clot. There is no way in the world to tell how long it would take.

A blood clot of the mesenteric vein would not stop the entire flow of the blood. It will get enough lodged somewhere and it will become decomposed and make a blood clot. That is my idea of that.

I operated on that fellow directly after I saw him, I believe the next day, and, just as I said, I doubt very seriously whether this varicose condition had anything to do with it. If this man had received a thrombosis of the mesenteric vein on January 26, and it was over a month thereafter when I saw him, I would have had difficulty in diagnosing that, because you do not possess an X-ray eye and you cannot see all those things, and that is the reason you cannot know just exactly. You can only go by the symptoms of the man. That is all in the world you have, and that is the reason why you would not know just exactly. You can only go by the symptoms. You cannot see it, and you cannot feel it, and that is the only way you can tell.

There is no certain time that it takes secondary anemia to set in. Anything that decreases the blood supply causes anemia. If you have fever five days you are going to have anemia.

By the Court:

There is no set time that it would take a case of pernicious anemia to develop from the condition that I saw this [fol. 57] man suffering from. Some of them will break up faster than others. It depends upon the constitution of the patient largely.

Redirect examination.

By Mr. Polk:

When I first saw this man he was not a strong man. He was in a fairly well nourished condition though the first time I saw him.

H. O. WINDELL, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is H. O. Windell. I live at 503 North Hutchinson street, here in Houston.

I knew Hal Cook in his lifetime. I had known him a little better than four years before his death. I was not related in any way whatever to Mr. Cook. I am related to him by marriage. He is my wife's sister's husband. Cook and I married sisters.

Mr. Cook was very healthy while I knew him. I never knew him to be in any other but good physical condition prior to the time of his last illness.

I saw Mr. Cook the very day after the accident, the very evening of the accident. He was at 110 North Estelle Street then, at his home. On that occasion when I saw him he was in pain. I stayed there that night nearly three hours, or a little better.

I am employed by the Southern Pacific. I have not been employed by the Ford Motor Company.

[fol. 58] I saw him very often subsequent to that first time I saw him. I was living about seven or eight blocks from him at that time. It was my custom to see him every evening after I got off from work.

I could not give you the correct date when he was taken to the hospital. I saw him out there every evening. When

I saw him the first evening after the injury he was suffering. He was suffering every time I saw him. He was being given medicine to relieve his pain. I could not swear what kind it was, but it was medicine to relieve him, I know. I know that it was given to ease him because a number of times I was there they gave him a hypo.

I went and got some medicine for him. I got the prescription from Dr. Dawes and went to the pharmacy and got the medecine for him.

I saw Mr. Cook after he was brought home from the hospital. He was very, very low at that time. He was pale, very pale, and seemed to be sick.

I saw Mr. Cook about two or three evenings before the twenty-sixth of January. I was not at his home. I saw him at his father in law's, at my father in law's house. He was feeling fine at that time, before the accident. He appeared to be physically in good condition. He did not complain of any injury at that time.

Ordinarily I saw him two or three times a week, I suppose, before he was injured, and then some. I never heard him complain of any injury before this particular time. I was not what you would call a real personal chum of this man before he married my sister in law, but I saw him a number of times and had conversations with him quite often. Subsequent to his marriage to my sister in law I was with him a good deal. I have been on outings with him a number of times. I have been with him going in swimming. [fol. 59] I have been in swimming with him in Spring Creek. We did not have on bathing suits. I saw Mr. Cook there stripped. I did not see any defects or anything of that character at all about him. He was a very good swimmer.

I never did work with him, except repairing cars around home. He was a mechanic and I was a mechanic too. The only work I ever did with him was around home repairing cars. He was vigorous and strong.

Cross-examination.

By Mr. Hightower:

I never did work with him at the Ford plant. I never did see him doing any work at the Ford plant. I never did

see him unloading any boats at the municipal docks. I never saw him receive an injury of any kind or character in my whole life. In referring to an injury I am just simply referring to something that I heard.

J. A. PETROSKY, a witness in behalf of the plaintiffs, recalled, testified as follows:

By Mr. Polk:

I considered that work down there unloading those parts heavy work.

I stated that when I went down there and started to work that night Hal Cook was with me. It was about two hours before he slacked up on his work. I could not tell the difference in his work until then. From that time on up until he stopped I could tell a difference in his work. After the two hours he complained of his back. From the beginning up until he complained of his back he was all right. Before that time I could not tell any difference in him, that he was hurt or anything.

[fol. 60] I lifted some of that material with him. We were lifting rear axles, truck axles and also touring axles. Those things were stacked four this way and four that way. They were stacked from the bottom of the boat to the top, just as far as they went, axles, and different things on top, small parts. As far as I recollect, there were small axles first, and then truck axles, and then small parts. In getting out that stuff we had to be on top of those axles and had to lift them out. You had no room to stand straight up. When we lifted those axles we laid them in what they called a pan. We picked them right up by the side and put them in. We worked them down from the stack as we unloaded the boat. There was no lifting but just into the pan.

Lifting those axles and heavy weights was straining work. I handled those axles at the automobile line at the plant. There was once I slipped with one of those axles and it caused me an injury. We were carrying one of those axles up to the line, and there was some paint on the floor, and I slipped about a foot.

Cross-examination.

By Mr. Hightower:

I was working right there with Mr. Cook all the time that he was in the boat. I did not see him receive any injury of any kind or character. He just complained of his back hurting him. If he had slipped or fallen there I would not necessarily have seen it. I was right there with him, though, working on the same pieces with him. He did not state how he got hurt or anything. He just said his back was hurting him. That is all he told me.

[fol. 61] Redirect examination.

By Mr. Polk:

Mr. Cook and I were not working together in a pair all the time. There were six or eight of us in the hatch, and I would work a little while with one and a little while with another, and then maybe another fellow would grab hold with me, and just change about.

Recross-examination.

By Mr. Hightower:

That was ordinary heavy work.

Plaintiffs rest.

MOTION FOR INSTRUCTED VERDICT

Mr. Hightower: Your Honor, we would like at this time to present a motion for an instructed verdict.
The Court: I will overrule the motion.
Mr. Hightower: Note our exception.

W. A. TOLAR, a witness in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Hightower:

My name is W. A. Tolar. I live at 6608 Avenue F, Houston, Texas.

I have worked for the Ford Motor Company. I was working for the Ford Motor Company about January 26, [fol. 62] 1927. I assisted in unloading the ship Lake Gorian that was at the municipal docks about January 26, 1927. I was working in number two hatch and he was working in number one. I knew him. I was not working with him on that boat. I did not see him there at work. He was in one hatch and I was in another.

Cross-examination.

By Mr. Polk:

I had known Hal Cook about three or four years. I worked right by the side of him on the line. I would judge him to be about six feet tall and to weigh about 170 pounds. He was an unusually strong man.

Dr. Peyton R. Denman, a witness in behalf of the defendant, testified as follows:

By Mr. Hightower:

My name in Peyton R. Denman. I am a physician and surgeon. I am a graduate of the Medical Department of Tulane University. I have had post graduate courses in Polyclinic, New York, Mayo Clinics, and Chicago. I graduated from the medical school in 1903. I have been practicing my profession continuously since that date. I am practicing now in the city of Houston.

Assuming, for the purpose of a hypothetical question, that a young man, apparently in good health, was unloading a ship where he lifted heavy rear axles; and after he had been working there for about two hours or maybe a little longer he complained with his back, complaining that it was hurting him, and he continued to work on for about an hour, and left the ship; and he is not accounted for any more until that day at noon, when he went home and was complaining [fol. 63] of suffering pain; and later, about a couple of weeks, he was examined and it was found that he was suffering with varicocele; and he was operated on about the fifteenth of February for varicocele, and on the twenty-eight-

of March he died, the secondary cause being anemia; based upon that hypothesis I do not think the primary cause could have been thrombosis of the mesentary veins. You understand that is the venus supply of the intestines. Thrombosis is a blood clot, either in an artery or in the vein. The symptoms are violent and sudden cramping, pains in the abdomen, together with intense nausea and vomiting, and early symptoms of intestinal obstruction, as occasioned either by severe constipation or gas enlargement of the abdominal walls, due to gas in the intestines, and a bloody mucos discharge; and thrombosis in any of the mesentary vessels would immediately, or within a period of two or three hours, produce a definite and rapid gangreen of the section of intestine supplied by the circulation blocked. That may — anywhere from one inch to twelve inches, depending upon the size of the embolus. This rapid gangreen develops in from two to four hours, and these patients never live over two or three days unless surgical intervention is immediately instituted, and even in that case it is a most hazardous surgical procedure, and for that reason I would say in this case that had nothing to do with it. A man could not live through three or four days with an embolus of the mesentary veins.

An operation for varicocele or varicose veins would not result in thrombosis of the mesentary veins. That is due to a physical fact that varicocele is an enlargement of the mesentary vein. That is the vein that carries the blood from the spermatic cord upward, and the left mesentary vein empties into the left renal vein. The renal vain in turn empties into the vena cava. That is the large vein, the large [fol. 64] trunk that all the tributaries have emptied into, and from here that blood is carried into the right heart, and from the right heart into the lungs. The veins gradually get larger until they reach the heart, and then they leave the heart through one large vein, and that vein branches out into many fine capilaries in the lung, where the venus blood comes in contact with the oxygen of the air and is sent back as red blood. So an embolus torn loose from an operation for varicocele would take this course by the spermatic vein into the left renal vein, and through that into the vena cava, and from there into the right heart,

and from there into the lung, and would be a pulmonary embolism instead of a mesenteric. The right spermatic vein empties directly into the vena cava, and from there goes into the right heart. There is absolutely no connection.

An embolis is a portion of a blood clot that is broken off and is carried into the blood stream and continues in the blood stream until it reaches a vessel that is so small that it cannot go any farther, and there it blocks that vessel, and that is what we know as an embolis. A thrombosis is a clotting of blood within the vein at a given local point. Infection does not necessarily set up wherever you have a thrombosis.

I did not say a thrombosis resulted from a strain. Thrombosis usually follows an organic condition, anything which causes arterio sclerosis or hardening of the arteries and of the vessel walls, and a rupture of the *sam*ll capillaries or veins or arteries, due to the lack of elasticity; for instance, to illustrate, apoplexy in older men. Now it is possible to develope an embolus from a ruptured vessel. In those cases the symptoms are most grave and severe from the beginning.

There is no specific time a man will live after he receives a thrombosis of the mesentery vessels, but the authorities [fol. 65] state from two to four days, unless relieved by surgical intervention. If this man had received a thrombosis on or about January 26 I think it utterly impossible for him to have lived until March 28. That is because he would within three or four hours develop gangreen- of a definite section of his intestine, which would if not interfered with produce locked bowel, and he would have died from the locked bowel or intestinal obstruction. Whenever you cut off the blood supply you get gangreen-, and unless you can get in there and cut out that portion the patient dies very promptly.

Secondary anemia would not usually follow thrombosis. There is no connection. Secondary anemia is brought about conditions that absorb the red blood cells, or the homeglobin of the red blood cells, with more rapidity than it can be manufactured, for instance, following typhoid. Secondary anemia is a sympton. It is not a condition at all, and never primarily kills a man. The thing that produces secondary anemia is the thing that kills a man.

Cross-examination.

By Mr. Polk:

Taking a young man about twenty-five years of age, about six feet in height, weighing between 165 and 170 pounds, and this young man has been engaged for a period of three or three and a half years in doing heavy physical, manual labor, and is fully developed physically; and he goes to work one night at 12:00 o'clock, and up to that time there is absolutely nothing the matter with him at all and he has no trouble of any kind; and he goes to work, and in about two hours time he complains to his fellow workers that he is suffering a tremendous pain in his back, and he then does no more work, and goes on the deck of the boat, and then goes home a few hours after that; and he complains [fol. 66] constantly of this severe pain in his back; and then soon after that he goes to a physician and he tells him of the severe pain in his back, and the physician gives him something in the nature of a pain killer, a narcotic prescription, and he takes that narcotic to ease his pain, and he continues to require more and more of this narcotic; and this goes on for something like ten or twelve or fifteen days, and a physician is called in and finds a varicocele, and finds that an operation is necessary, thinking at the time the pain is caused by the varicose veins; and he is operated on and the operation is a success, and there is no come back, no infection of any sort, absolutely a clear cut operation, and he is relieved from the pain, but only for a very short while; and this pain is in the lower part of the opening inside of the human body in there, right around the cavities on the inside there, and he complains that the pain is very severe in there; and this continues and he is removed to a hospital, and gives a history there of having been lifting a heavy axle in the hold of this ship, when he feels something tear loose on the inside, causing the severe pain, and causing him to stop work; and this man remains in the hospital, and occasionally passes blood from the stool, and has a hemorrhage and discharge; and he stays there from March 1 to March 23, when he is taken home from the hospital in a very anemic condition, and on the twenty-eighth day of March he dies; I could not say what killed

that man, without further examination. It being further true that all the examinations were made for the purpose of eliminating the possibility of any of the cocchis of any sort or any infection, it is hard to state specifically, with such an imperfect examination of a patient, just what caused his death. I do not believe anybody could state that with any degree of knowledge from the symptoms that you have set forth in your question.

I did not know Hal Cook. I never saw him.

[fol. 67] By the Court:

According to the statement he had a lot of hemorrhage, I believe. That would indicate one of two things, that he had a- ulcerated condition somewhere in his intestinal tract, or he had ruptured an intestine. Now the symptoms of a ruptured intestine would begin by most violent pain, and would produce nausea and vomiting, and *and* immediately would cause peritonitis.

Taking just the matter of hemorrhage, I would look for just one thing. I would look first for a- ulcerated condition of the bowels to determine whether or not the patient had bleeding bowels, starting at the lower part to determine whether or not the patient had bleeding piles. Sometimes a case of bleeding piles will cause the patient to lose sufficient blood to cause this secondary anemia. If I did not find that condition I would do an examination with an illuminated instrument put into the man's colon, some three or four feet of his lower bowel, and then if that was negative, no ulceration, and he was still passing blood, with this negative history, and in the absence of any symptoms of peritonitis, mark you, I would order what we call a gastro intestinal X-ray examination. That is done by the use of a certain kind of meal, and with a flu-roscope you watch that meal go down, and it will definitely show any pathological condition in the stomach and intestines. I think in such a case that certainly would have been the procedure to follow.

An embolus that I have described would only stop one place, and that would be in the lungs. That would not cause a slow death. It would cause a sudden death.

It seems to me, from Mr. Polk's question, that the man had some condition within his intestinal tract that caused

hemorrhage, which produced the secondary anemia that both attorneys have asked me about. Then I would state that this man died from a condition within the intestinal tract [fol. 68] that permitted a continuous, daily hemorrhage, which produced secondary anemia, finally dying from actual weakness and loss of blood. I put as the seat of the trouble which caused his death the intestines. It appears from the questions asked that that is where the trouble was. It is my opinion, from the questions asked, that he suffered from some trouble within the interior of the intestines which gradually produced his death.

The intestinal condition had nothing to do with the varicocele. There is no connection. There is no way to tell what caused the hemorrhage.

If fifteen days after the injury he was treated with opiates to relieve his pain, and then was operated on for varicocele, the doctor stating that he seemed to be in fair physical condition, with no anemia; that he was complaining of pains down in his testi*cal*, which the doctor attributed to this varicocele; and the doctor operates on him and claims it was a good operation, and then after that he dies; and shortly after the operation his fever rises considerably, and then there was the setting up of what is called secondary anemia; that history is entirely negative.

I believe I endeavored to picture a perfectly normal, healthy individual, who received any kind of an injury to any of the contents of the abdomen. The very first symptoms he would have would be a violent cramp like pain in the abdomen. And soon following that, if not almost immediately, there is a nausea. That is true if you hit a man in the stomach with your fist. You knock the breath out of him and he turns pale and get sick at his stomach, and suffers cramps within the abdomen, and is never referable to his back. This man gave no such symptoms of trouble within his abdomen; and I cannot conceive of a traumatism of any kind unless it produces those typical symptoms, violent pains in the abdomen, nausea, vomiting, sick stom- [folfl 69] ach, and very soon peritonitis. Those symptoms are universal and are detailed by all authorities on this subject without any variation.

It is my opinion that that pain in his back had no connection with that intestinal trouble which he had at the time

of his death. He could have had some constitutional disturbance, anything to produce an ulcerated condition within the inside of his intestines. Those ulcers might begin to bleed slowly, as they always do, and produce these painful conditions in the back, and the patient becomes weaker and weaker and gets paler very gradually from the continued loss of blood. The most plausible theory, I think, is that he had an ulcerated condition of the stomach at the time he first complained, which would explain the pain in the back, and also later explain the loss of blood. To me that is the only reasonable theory that could be given; and this varicocele that happened along at the same time had nothing to do with it. It has no connection with either condition.

Dr. JAMES A. HILL, a witness in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Hightower:

My name is Dr. James A. Hill. I am a physician and surgeon. I am a graduate of Tulane University, Louisiana. I graduated in 1900 and have been practicing the profession continuously since. I have been practicing in Houston about eighteen years.

I made a physical examination of Mr. Hal Cook. That examination was made February 10, 1927, I think. I made a physical examination for an injury he was supposed to have had. I did not find any objective symptoms of an injury. He complained of pain in his groin that extended back to his back.

[fol. 70] He showed a slight mass of varicose veins along the left cord and upper portion of the scrotum, and he claimed it was very tender. I found absolutely no objective symptoms of any injury.

If at the time I examined him he had been suffering from a thrombrosis of the mesentary veins I think it would have been readily diagnosed. If you have a thrombosis you usually have an anemic condition following it, and you have very severe pains, and a man with thrombosis is extremely sick and one that is not able to walk around to your office.

I advised an operation for vericocele. That would not

be attributed in any way to any strain or injury of any kind. Those things are usually due to a pathological condition of the valves of the veins. In varicose veins the little valves become diseased, and the blood does not travel back in the normal way, and in that way the veins become dilated and enlarged and develop what we call varicose veins.

Cross-examination.

By Mr. Polk:

I do not think varicose veins are caused by injuries.

This man walked in my office. I do not know how he came up to the office.

Redirect examination.

By Mr. Hightower:

He was not in an anemic condition at that time.

[fol. 71] B. F. Teague, a witness in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Hightower:

My name is B. F. Teague. I am timekeeper at the Ford Motor Company. I have been timekeeper for the Ford Motor Company since about January 1, 1926.

I kept the time of a man by the name of Hal Cook who worked for the Ford Motor Company. He worked for the Ford Motor Company since some time in 1923.

I kept the time of the employees that were unloading the ship Lake Gorian of the Ford Motor Company on January 25, 26 and 27 or [of] 1927; that is, I kept the time on the night shift from midnight on the twenty-fifth until 12:00 on the twenty-sixth, and the next night the same time. That was the shift Mr. Cook was on. I kept his time. He started on the Lake Gorian at midnight of the twenty-fifth and he worked from midnight of the twenty-fifth to noon of the twenty-sixth. That is what I call the night shift. He worked that twelve hours. He left the ship at 12:00 o'clock the twenty-sixth.

He did not work on the twenty-seventh. I do not know whether he reported for work on the twenty-seventh. We did not use but half the crew that night. All of them were supposed to have reported, and the foreman sent them home, and so when I checked them over he was not there. He did not work that night at all. My records show that he was paid for an hour's work on the twenty-seventh. We pay everybody for an hour whether they work or not. I do not know whether he reported or not because I did not see anybody except the ones that were working, that actually stayed and worked; and everybody was paid for an hour that was on that job, even if they were sent home, for coming down there.

[fol. 72] I do know that he worked from midnight of the twenty-fifth to noon of the twenty-sixth, and was paid for that. I was right there at the ship. I made a trip through the ship every hour, or approximately that time. I tried to make it that much.

Mr. Cook never complained to me of receiving any injury or strain of any kind or character while working on the ship Lake Gorian. I was there, and they always reported injuries to me. The doctor was there part of the time, and he was the one who took care of injuries.

Cross-examination.

By Mr. Polk:

The night that I was there, on the twenty-sixth, the morning of the twenty-sixth, I recall seeing Mr. Cook that night, and then I checked them over every hour to see that they were there, and made a notation of everybody that was there. He was below, in the hold of the ship. I do not remember exactly whether he was there all the time, but that is where the work was. He had to go down in the hold to get to where they were working. I do not recall whether he was down there all the time.

Redirect examination.

By Mr. Hightower:

I was to check the time of everybody working in and about the ship there. I was to check everybody, whether

they were in the ship or on deck. I kept the check so as to know how to pay them.

[fol. 73] Recross-examination.

By Mr. Polk:

I do not know of my own personal knowledge whether he was down there the following night or not.

D. F. SHEPHERD, a witness in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Hightower:

My name is D. F. Shepherd. I work for the Ford Motor Company. I have been working for the Ford Motor Company going on twelve years. I have worked for the company in unloading the Lake Gorian. I was foreman of number one and number two hatches.

I did not hear Mr. Hal Cook complain of receiving an injury or strain of any kind or character while working on the Lake Gorian that I recall. I was there about the hatch all the time.

Testimony closed.

MOTION FOR INSTRUCTED VERDICT

Mr. Hightower: Your Honor, the defendant wants to request the Court to instruct the jury to return a verdict in favor of the defendant.

The Court: I understand you have written your motion to instruct.

Mr. Hightower: Yes, sir.

The Court: I will overrule the motion.

[fol. 74] Mr. Hightower: Note our exception.

CHARGE OF THE COURT

The Court: GENTLEMEN OF THE JURY: Under the rules of this Court the juror sitting in the first seat facing me is your foreman.

This case has come down to a very simple issue of fact; that is, the statement of the issue is simple. The evidence upon which the solution depends may be regarded as simple or complex according to how the jury looks at is. There is only one question for the jury to decide. I will give you two forms of verdict: one, "We, the jury, find for the plaintiffs;" and the other, "We, the jury, find for the defendant." Just select whichever one you find, and have your foreman sign it, and it becomes your verdict.

Under the statutes of the State of Texas there has been substituted for the old action for damages which existed at common law against an employer, where his negligence caused the injury to a workman, what is known as workmen's compensation, and these statutes fix the responsibility of the defendant and the rights of the plaintiff. These statutes provide that in case of an injury of an employee sustained in the course of his employment as the result of some accident, something unfor-seen occurring, that he may recover without proof of negligence a certain sum, so much per week, for injury, and so much for death.

The parties in this case have agreed that if the decedent, the man who is dead, came to his death as the result of an accidental injury sustained while he was in the dis- [fol. 75] charge of his duties of his employment that he shall recover the maximum amount stated in the statute, that is, his wife and child shall recover. If he did not receive such an injury they recover nothing.

Therefore, the simple question in this case is whether plaintiffs have shown you, as the law requires them to do, by a preponderance of the evidence that the deceased came to his death as the result of an accidental injury received in the course of his employment. If plaintiffs have sustained that burden your verdict should be, "We, the jury, find for the plaintiffs." If not, you should find for the defendant.

There is no question in this case about the fact that, the plaintiff being a widow with a small child, it is the natural inclination of a jury, as a matter of generosity, to find for the plaintiff. That is perfectly natural. We all recognize that. The defendant, Employers' Liability Assurance Corporation, is a company organized for the purpose of

writing insurance under the terms of the law, and there is no question as between the plaintiff and the defendant, if the matter were to be decided by sentiment, that the natural, human instinct would be in favor of the plaintiff; but of course this jury is not going to decide this case that way. A foreign corporation has the right to have its case tried fairly, and the Federal Courts are constituted for that purpose; so that, irrespective of personal feeling, the jury trying such a case will look at it as an abstract proposition, just as though the people in the case were dummies and the solution of the case was like a mathematical problem. You are not concerned with whether it helps or hurts the plaintiff or the defendant. You can't vote people's money that way.

It is conceivable that you would belong to the employing class which writes insurance, and that you don't think people ought to recover, and that you should write your ver- [fol. 76] dict on the theory that you wanted to discourage suits. That is not right either. You are solving this case upon the question, does the plaintiff show you, in considering this evidence, and balancing the evidence on the one side against the evidence on the other side, does the plaintiffs' evidence preponderate, that is, is the plaintiffs' evidence heavier, whether it makes the plaintiffs' side of the scale go down. Theoretically the scales are balanced like that, and if the plaintiffs put enough weight on that side of the scale to bear it down, so it looks more reasonable to you from the evidence that their theory is right than that the other theory is right, you will find for the plaintiffs; and if they do not do that you will find for the defendant. The law doesn't give her any advantage at all. In fact, the law puts a burden on her. The burden is on the man that sues to weigh down the scales in his favor.

You have heard the evidence. It is a case of circumstantial evidence. Nobody testifies that this man made an overlift. Nobody saw him make an overlift. There is no statement of his own before you that he did make an overlift. I explained to you in the course of the evidence that the statement he gave to the doctor can only be considered by you as part of the doctor's theory. The statement of the deceased, what the deceased told

them, was that his back was hurting him terribly and he thought he would have to quit. Plaintiff argues from that, here was a man claiming nothing the matter with him before in the course of lifting heavy weights, and that makes this an accident. They have one doctor who says the thing could reasonably have occurred just that way, and that in his opinion that is the way it did occur, and the other is a doctor who says the other. The defendant says the man never complained of any strain, never made any statement [fol. 77] to anybody that he was strained at the time of the injury, and never asked for any treatment, but went all the way along on the theory that something else was wrong with him besides the thing that is now claimed.

Those things are put up to you, and you must say whether the plaintiff establishes her case in your minds by a preponderance of the evidence. It is not like a criminal case, where it has got to be beyond a reasonable doubt. It is a question of whether her side of the case preponderates. The plaintiff has got to give you something to base your verdict on, and the defendant need only say that you haven't proved it, and if that is the case you can't find a verdict. You have got to be able to rest your verdict upon evidence that the plaintiff has given you, upon a theory she has given you of that death.

The man is dead. There is no doubt about that. He died from something. The plaintiffs says that he complained, and that their theory as testified to by their doctor makes a plain case that there was an accident, and the defendant says the contrary. You are to choose between those theories, with the obligation upon the plaintiff to make her theory more reasonable than the defendant's. If they balance you should find for the defendant. If you can't tell, find for the defendant; but if you can say that the evidence preponderates, overweighs, on the side of the plaintiff, then you will find for the plaintiff.

Are there any requests for the plaintiffs, or any exceptions?

Mr. Polk: Your Honor, I would like for the Court to charge just a little bit on that accidental feature of that.

The Court: What do you wish me to charge?

[fol. 78] Mr. Polk: Just that it need not be a physical trauma, but the happening of something unfor-seen, something along that line, it seems to me.

The Court: I said if in the course of a man's work he got a strain that is an accident. If the character of his work was such that he got a strain every day that would not be an accident. That would be a job. But a man don't go into work with the idea of getting a strain. If you get one it is something unfor-seen. If he got a strain as the result of lifting it is an accident. It is a question of whether he had an accidental injury. It means something in connection with the work he was doing which was not a part of the usual course of that work. If it is something that happens that is not for-seen that is an accident.

Any requests for the defendant?

Mr. Hightower: Right in that line, Your Honor, I would like for the jury to be instructed further that if in the ordinary lifting, in the ordinary way of lifting parts, he strained himself, that would not be an accidental injury within the Workmen's Compensation Act, but that an accident implies a sudden, unexpected and fortuitous occurrence.

The Court: I will refuse the charge and give just the contrary. If in the course of the operation he lifted and got a strain it is an accident, unless he got those strains every day.

Mr. Hightower: We except to the Court's charge in that respect.

[fol. 79] The Court: There is no evidence whatever in this case that the ordinary and usual course of that kind of business was for a man to be strained, and if he got strained it was necessarily something unusual, unfor-seen and accidental.

Mr. Hightower: I also want to except to the Court's charge with respect to no evidence being in there that it was ordinary or usual for that character of work to strain. The last witness, Mr. Petrosky, on re-direct examination testified that the parts were heavy and that it was straining work.

The Court: I don't mean to charge the jury the straining a man would do in the course of his work every day. I mean a strain in the sense of dislocation or severance or injury to some part of his anatomy. By strain I mean parting, severing or becoming injured as the result of the injury, as the result of that effort at lifting. That is a strain.

Any other requests?

Mr. Hightower: That is all, Your Honor.

The Court: All right, you can sign the verdict, and destroy the sheet you don't want to turn in when you sign it. If you find a verdict during the afternoon put it in an envelope and return to the Court in the morning at 9:00 o'clock to deliver the verdict in open court. We will stand adjourned until 9:00 o'clock.

[fol. 80] AGREEMENT RE BILL OF EXCEPTIONS

We, the undersigned attorneys for plaintiffs and defendant, here now agree that the above and fore- constitutes a full, true and correct statement of all the testimony introduced upon the trial of the above numbered cause, all exceptions reserved by the defendant during said trial, and a true and correct statement of all the proceedings had upon said trial; and we hereby approve the foregoing Bill of Exceptions.

Polk & Allen, Attorneys for Plaintiffs. Vinson, Elkins, Sweeton & Weems, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions and statement of the evidence having been presented to me, and having been examined and found correct by me, is here now approved and ordered filed among the papers of this case and made a part of the record herein, the same containing all the evidence heard by the Court in said cause and a true and correct statement of all the proceedings had upon said trial.

Done at Houston, Texas, this 11th day of July, 1928.

J. C. Hutcheson, Jr., U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

Now comes appellant, Employers' Liability Assurance Corporation, Ltd., of London, England, and in connection

with its appeal says that the judgment in said cause is erroneous and against the just rights of the appellant for the following reasons:

[fol. 81]

I

Because the alleged injury to deceased having been sustained on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service, the cause of action was exclusively within the maritime jurisdiction of the United States District Court, and therefore, the trial Court did not have jurisdiction to render judgment against appellant under the Texas Workmen's Compensation Act.

II

Because there is no evidence upon which to base a judgment against the appellant in that there is no evidence in the record that deceased, Hal Cook, died as the result of an accidental injury sustained within the course of his employment.

III

Because the evidence was insufficient to base a judgment against appellant in that the evidence is wholly insufficient to raise the legitimate inference that deceased, Hal Cook, died as a result of accidental injury sustained within the course of his employment.

IV

Because the evidence is insufficient to base a judgment against appellant in that there is no positive testimony in the record that deceased, Hal Cook, received a strain, and that he sustained a thrombus of the mesenteric veins, and it would be necessary to base a presumption upon a presumption to support the judgment rendered against appellant.

[fol. 82]

V

Because plaintiffs failed to discharge the burden of proof to establish by a preponderance of the evidence that the deceased, Hal Cook, sustained a thrombus of the mesenteric

vein as a result of a strain and that, therefore, the evidence was insufficient to support the judgment rendered herein.

VI

The Court erred in refusing to give the following instruction requested by the defendant:

"Right in that line, Your Honor, I would like for the jury to be instructed further that if in the ordinary lifting, in the ordinary way in lifting parts, he strained himself, that would not be an accidental injury within the Workmen's Compensation Act, but that an accident implies a sudden, unexpected and fortuitous occurrence."

because under the Texas Workmen's Compensation law a strain received in ordinary lifting by reason of the work itself where nothing happened or occurred suddenly, unexpectedly or fortuitously, it would not be a personal injury or accidental injury within the scope of the Texas Workment's Compensation Act.

VII

The Court erred in instructing the jury as follows:

"I will refuse the charge and give just the contrary. If in the course of the operation he lifted and got a strain it is an accident, unless he got those strains every day."

[fols. 83 & 84] because if the strain permits a recovery even though the deceased, Hal Cook, strained himself in the ordinary manner and way of lifting without the happening of a sudden, unexpected and fortuitous event and permits a recovery even though the deceased Hal Cook strained himself in lifting parts in the usual and customary way without any mishap or fortuitous occurrence.

Wherefore appellant prays for a reversal of the judgment of the District Court.

Vinson, Elkins, Sweeton & Weems, Attorneys for Appellant.

Supersedeas bond on appeal for $10,000, approved and filed July 11, 1928, omitted in printing.

[fol. 85] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 11, 1928

To the Clerk of the above Court:

Please prepare a transcript of the record in this cause, to be filed in the office of the United States Circuit Court of Appeals for the Fifth Circuit under the appeal heretofore allowed in this cause and include in the transcript the following pleadings, proceedings and papers on file, to-wit:

(1) Caption.
(2) Plaintiffs' Original Petition.
[fol. 86] (3) Plea to the Jurisdiction and Original Answer of the Defendant.
(4) Bill of Exception.
(5) Judgment of the Court and Verdict of the Jury.
(6) Motion for New Trial filed by Defendant.
(7) Order of the Court overruling Motion for New Trial.
(8) Notice of Appeal given by Defendant to Plaintiffs.
(9) Notice of Appeal filed by the Defendant.
(10) Petition for Appeal and Supersedeas.
(11) Order allowing appeal and superseding judgment.
(12) Assignments of Error.
(13) Supersedeas Bond on Appeal.
(14) Præcipe for transcript.
(15) Usual Clerk's Certificate.

Vinson, Elkins, Sweeton & Weems, Attorneys for Appellant, Employers' Liability Assurance Corporation, Ltd., of London, England.

[fol. 87] Service of copy of the Directions to the Clerk for making up Transcript of Record on Appeal of said cause acknowledged this the 9th day of July, 1928, and we agree that the documents mentioned therein shall constitute the transcript in this cause.

Polk & Allen, Attorneys for Appellees. Sam C. Polk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] Minute entry of argument and submission January 8, 1929, omitted in printing.

[fol. 89] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 5395

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, Appellant,

versus

Mrs. MYRTIS COOK et al., Appellees

Appeal from the District Court of the United States for the Southern District of Texas

C. M. Hightower, Fred R. Switzer (Vinson, Elkins, Sweeton & Weems, on the brief) for Appellant.

Sam C. Polk and Ira J. Allen (Polk & Allen on the brief) for Appellees.

Before Walker, Bryan and Foster, Circuit Judges.

OPINION—Filed March 29, 1929

BRYAN, Circuit Judge:

This is an action at law, under the Workmen's Compensation Law of Texas, to recover compensation for the death of Hal Cook, an employee of the Ford Motor Company. The employee's widow obtained a verdict, and in pursuance of the statute, judgment was entered up against appellant upon its policy of compensation insurance.

[fol. 90] The Ford Motor Company owned a plant at Houston, Texas, for the assembling of automobiles manufactured by it. It also owned two steamships, The Oneida and The Lake Gorian, in which it carried its automobiles and parts thereof from Detroit to various assembling points, including Houston. The Oneida first came to Houston in December, 1924, and made four other trips to that port in 1925; The Lake Gorian came to Houston first on December 16, 1926, and again on January 26, 1927. The two ships were

unloaded on each trip by employees from the assembling plant without the aid of stevedores or longshoremen, in obedience to the directions of their employer. Hal Cook was one of the employees of the Ford Motor Company's assembling plant at Houston, where he worked as a mechanic from July 10, 1923, until January 26, 1927, when he was injured while assisting in unloading the Lake Gorian. He had assisted in unloading that ship on its previous trip, but had not helped to unload the Oneida on any of her trips. The injury occurred while he was in the hold of the ship attempting to lift a bundle of automobile axles. The evidence shows without conflict that he suffered a severe strain, was unable to work any more, and died two or three months later. Expert witnesses for appellant gave it as their opinion that Cook's injury was not the cause of his death, but there was sufficient evidence for appellee to support a finding that death was the direct result of the injury.

Appellant contends that the cause of action asserted is within the exclusive jurisdiction of a court of admiralty, and therefore cannot be maintained under the Workmen's Compensation Law of Texas. The martime law is not so exclusive as to prevent recovery under the workmen's compensation acts of the States in all cases of accident on navigable waters. In Southern Pacific Co. v. Jensen, 244 U. S. 205, it was held that "no such legislation (i. e. [fol. 91] workmen's compensation laws of the States) is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony or uniformity of that law in its international and interstate relations." But the rules of the maritime law may be modified by state statutes providing compensation for employees, where such statutes concern purely local matters and work no material prejudice to the maritime law. Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469. The difficulty lies in applying these general principles to the facts of any particular case. The Oregon Compensation Act was held to apply and to afford an exclusive remedy in Grant Smith-Porter Ship Co. v. Rohde, supra. That was a case of a maritime tort of which the admiralty court would have had jurisdiction but for the state statute. The employee was doing carpenter work on the

vessel that had been substantially completed and had been launched on the Willamette River. It was pointed out in the opinion that the employer and employee had not "consciously contracted with each other in contemplation of the general system of maritime law," but had contracted with reference to the state statute; and it was held "that their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential." The Texas Compensation Act under consideration here was held to abrogate the right to resort to the admiralty court in Millers' Underwriters v. Braud, 270 U. S. 59. That also was a case of a maritime tort which resulted in the drowning of a diver who was engaged in sawing off submerged piling which formed an obstruction to navigation in the Sabine River.

[fol. 92] The injury to the employee in the case at bar was not caused by a tort; it was a pure accident. Appellee could obtain no relief in admiralty, and has none unless it be under the Texas Workmen's Compensation Law. We are of opinion that the state statute applies under the peculiar facts of this case. As in the Rohde case, the employee and employer did not contract in contemplation of the maritime law. The employee's work was to be done upon land. It was only because he was directed to do so that he ever went aboard the ship. It would be extreme to say that he was a longshoreman or stevedore or is to be classed as a seaman within the meaning of §20 of the Merchants' Marine Act of 1920 as construed by the Supreme Court in International Stevedoring Co. v. Haverty, 272 U. S. 50. The work he did in unloading the Lake Gorian on her two trips to Houston was so infrequent and occupied so small a part of his time as to be merely incidental to his regular employment. The Ford Motor Co. owned but two ships which it did not use in commerce except to carry its own goods. The employees were not engaged to unload cargo generally, but only to take their employer's cargo off their employer's ship. We think it fairly can be said that the matter of unloading these two ships of the Ford Motor Co. at rare intervals was "of merely local concern, and its regulation by the state will work no material prejudice to any feature of the general maritime law." Millers' Underwriters v.

Braud, supra. It is true that in Northern Coal Co. v. Strand, 278 U. S. 142, it was said that the unloading of a ship was not a matter of purely local concern. But the language used in any opinion is to be construed in the light of the facts under consideration. In the just cited case the employees were engaged to work regularly both upon the dock of their employer and upon ships which came to that dock to be unloaded. The contract of employment contemplated [fol. 93] that the employees should unload the ships as well as handle coal on the dock. That case arose under the Wisconsin compensation act which is compulsory, and the Supreme Court held "that the State had no power to impose upon the employer liabilities of that kind in respect of men engaged to perform the work of stevedores on ship board." The Texas compensation act is elective, and, as already stated, the injury here complained of was accidental and was not attributable to a maritime tort. Both the employer and the employee could have refused to accept the benefits and responsibilities of the State statute. If the employee had done that he could have recovered nothing in admiralty. Any liability in this case therefore arises out of a contract, the enforcement of which cannot affect any principle of the admiralty law. Under elective compensation laws it has been held by the Supreme Courts of Maine and Oregon that liability exists in cases of accidental injury to an employee engaged in maritime employment, where such injury is not caused by tort. Berry v. Donovan & Sons (Me.), 155 Atlantic 250; West v. Kozer, 104 Ore. 94; Rickert v. State Industrial Accident Commission, 22 Ore. 565. We are not aware of any ruling to the contrary by the Supreme Court of the United States.

The judgment is affirmed.

[fol. 94] In United States Circuit Court of Appeals

[Title omitted]

Dissenting Opinion—Filed March 29, 1929

Foster, Circuit Judge, dissenting:

This suit is against an insurance company and it is stipulated that the policy covered only such employees as were

within the scope of the Texas Workmen's Compensation Act. The Texas law could not be made to apply to seamen engaged in interstate commerce. It also is agreed that a man employed by the Ford Motor Company signifies by signing an employment slip that he is open for any kind of work within the jurisdiction of the company. It seems to me to be immaterial how much or how little work he does of unloading vessels. While doing that work he is to be classed as a seaman. When the deceased was injured he was employed as a seaman engaged at the time in interstate commerce. I must admit that it is difficult to reconcile the various decisions dealing with state compensation laws as applied to maritime torts but I can see no distinction in principle between the case at bar and the case of Northern Coal Co. vs. Strand, 278 U. S. 142. On the authority of that case, which is the latest decision of the Supreme Court of which I am aware, I respectfully dissent.

[fol. 95] In United States Circuit Court of Appeals

No. 5395

Employers' Liability Assurance Corporation, Limited, of London, England,

versus

Mrs. Myrtis Cook et al.

Judgment—Mar. 9, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Employers' Liability Assurance Corporation, Limited, of London, England, and the surety on the appeal bond herein, American Employers Insurance Co. of Boston, Mass., be

condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Foster, Circuit Judge, dissenting.

[fol. 96] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, Appellant,

vs.

MYRTIS COOK et al., Appellees

Motion for Rehearing of Employers' Liability Assurance Corporation, Ltd., of London, England

PETITION FOR REHEARING—Filed April 11, 1929

Now comes the appellant, Employers' Liability Assurance Corporation, Ltd., of London, England, in the cause above numbered in which this motion is filed, and moves the Court to set aside the judgment rendered therein on March 29th, 1929, and grant it a rehearing for the following reasons, to-wit:

First

The Honorable Circuit Court of Appeals erred in affirming the judgment of the District Court and in holding that the Texas Workmen's Compensation Act, providing for compensation for accidental injuries and death to employees [fol. 97] applied where the deceased employee sustained an accidental injury while in the hold of a vessel unloading the same, which vessel was lying in navigable waters and while said employee was engaged in the performance of a maritime service and within the course and scope of his employment, because the said cause of action, if any, was exclusively within the maritime jurisdiction of the United States District Court.

Second

The Honorable Circuit Court of Appeals erred in affirming the judgment of the District Court because there was no evidence of more than a scintilla that the deceased employee received an accidental injury in the course of his employment which resulted in his death.

Wherefore appellant prays that the issuance of mandate may be withheld until this motion is disposed of; that this motion be granted; the judgment of this Court heretofore entered be set aside and the cause be reversed and here rendered for appellant; or, in the alternative, that it be reversed and remanded for a new trial.

Respectfully submitted.

Fred R. Switzer, C. M. Hightower, Attorneys for Appellant. Vinson, Elkins, Sweeton & Weems, of Counsel.

[fol. 98] Certificate of Counsel

I, C. M. Hightower, one of the attorneys for appellant, Employers' Liability Assurance Corporation, Ltd., of London, England, hereby certify that I prepared the foregoing Motion for Rehearing and know the contents thereof, and in my opinion the same is well founded, and that the prayer of appellant for rehearing should be granted by this Court.

C. M. Hightower, Attorney for Appellant, Employers' Liability Assurance Corporation, Ltd., of London, England.

[fol. 99] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—April 23, 1929

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 100] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed April 24, 1929

Now comes the Employers' Liability Assurance Corporation, Ltd., of London, England, appellant in the above cause and would show that on April 25th, A. D. 1928, in the District Court of the United States for the Southern District of Texas, the appellees, Mrs. Myrtis Cook and her minor daughter, Geraldine Cook, recovered a judgment against appellant in the sum of Seventy-two Hundred Dollars ($7,200.00) being Three Hundred and Sixty (360) weeks' compensation at the rate of Twenty Dollars ($20.00) per week as provided by the Texas Workmen's Compensation Act, the amount of the judgment being apportioned one-third (⅓) to each of appellees and one-third (⅓) to their attorney of record, Sam C. Polk, the said judgment bearing interest at the rate of six per cent (6%).

That a timely appeal was sued out by appellant to this court and it superseded said judgment by giving bond in the sum of Ten Thousand Dollars ($10,000.00) with the American Employers' Insurance Company of Boston, Massachusetts, as surety.

[fol. 101] That upon appeal, this court, on the 29th day of March, A. D. 1929 entered its order and judgment in all things affirming the judgment against the appellant.

That the appellant feeling itself aggrieved by the action of this court in affirming said judgment is desirous of, and will apply to the Supreme Court of the United States for a writ of certiorari to review said order and judgment entered by this court.

Wherefore, it prays that an order be issued herein staying issuance of the mandate of this court and the issuance of execution and enforcement of said judgment until the Supreme Court of the United States passes upon the application of certiorari to be made thereto on behalf of the appellant, and the amount of bond required to be given by

this appellant pending said application for said writ of certiorari be fixed in the order granting said stay.

Respectfully submitted.

(Signed) Fred R. Switzer, C. M. Hightower, Attorneys for Appellant, Employers' Liability Assurance Corporation, Ltd., of London, England.

[fol. 102] In United States Circuit Court of Appeals

Order Staying Mandate

On consideration of the application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for the period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 35 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, Louisiana, this 24th day of April, A. D. 1929.

(Signed) R. W. Walker, United States Circuit Judge.

[fol. 103] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 104] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,194. United States Circuit Court of Appeals, Fifth Circuit. Term No. 81. Employers' Liability Assurance Corporation, Ltd., of London, England, petitioner, vs. Mrs. Myrtis Cook et al. Petition for writ of certiorari and exhibit thereto. Filed May 9th, 1929. File No. 34,194.

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WM. R. STANSBURY ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 81

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

versus

MRS. MYRTIS COOK ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EMPLOYER'S LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND,
The Above-mentioned Petitioners,
By W. A. VINSON,
CLYDE A. SWEETON,
Its Solicitors.

VINSON, ELKINS, SWEETON & WEEMS,
Of Counsel.

(34,194)

SUBJECT INDEX.

Petition for writ of certiorari:

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 885

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

versus

MRS. MYRTIS COOK ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Supreme Court of the United States:

Now comes Employers' Liability Assurance Corporation, Ltd., of London, England, and petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review its decision of that Court.

Petitioner exhibits herewith the necessary certified copies of the pleadings, transcript of record filed in the

Circuit Court of Appeals, said transcript embracing also all of the proceedings of that Court. Petitioner presents herewith an accompanying and supporting brief.

The Respondents are Mrs. Myrtis Cook and Geraldine Cook, a minor. The solicitors of record for Respondents are Sam C. Polk and Polk & Allen, of Houston, Texas.

In support hereof Petitioner represents:

I.

Summary and Short Statement of the Matters Involved.

A. Amount Involved.

The amount involved, without interest, is $7,200.00 (R. 16).

B. Basis of the Suit.

At the time this suit was filed, Respondents, Mrs. Myrtis Cook and Geraldine Cook, a minor, were the surviving wife and child, respectively, of Hal Cook, deceased.

Hal Cook had been working for the Ford Motor Company for a period of more than three (3) years prior to his death on March 28th, 1928.

Petitioner had issued to the Ford Motor Company a Texas Workmen's Compensation Policy of insurance covering such of its employees as were within the scope of the Workmen's Compensation Act, which policy was in effect at the time of the alleged injuries to the deceased, Hal Cook.

The Ford Motor Company had a branch plant in Houston, Texas, where it assembled Ford automobiles. Its domicile and principal place of business was in Detroit, Michigan, and it owned and operated two vessels upon the high seas for the purpose of transporting its automobile parts and accessories to its various branch plants, including the Port of Houston, Texas.

The greater portion of the deceased's duties were performed in the assembling plant and a very small per cent of his duties were performed in unloading vessels. However, he signed an employment slip obligating himself to do any work within the jurisdiction of his employer, and at the time of the alleged injury he was actually in the hold of a vessel anchored in navigable waters of the United States.

It was claimed by Respondents that deceased received a strain while unloading automobile parts which produced thrombosis (blood clot) of the mesenteric veins, which caused secondary anemia, the primary cause of his death. There was no positive testimony that he strained himself and no positive testimony that he sustained a thrombosis of the mesenteric veins.

C. Proceedings in the United States District Court.

Suit was brought by Mrs. Myrtis Cook, individually and as next friend of her minor daughter, Geraldine Cook, as beneficiaries of Hal Cook, deceased, against Petitioner, pursuant to the Texas Workmen's Compensation Act to recover three hundred and sixty (360) weeks' compensation at the rate of twenty dollars ($20.00) per week (R. 1 to 5).

All jurisdictional requirements prescribed by the Texas Workmen's Compensation Act were alleged by Respondents; and also that Petitioner had issued a policy of Workmen's Compensation Insurance to Ford Motor Company, the employer of the deceased, Hal Cook, which was in force and effect on the date of the death of deceased, Hal Cook (R. 2 to 6).

It was alleged by Respondents that on or about January 26th, 1927, while engaged in the performance of his contract of employment with the Ford Motor Company, he was instructed to assist in unloading a vessel belonging to his employer, Ford Motor Company, then anchored at the wharf at Houston Ship Channel at Houston, Texas, and while so engaged in unloading the cargo from said ship, consisting of automobiles and various parts of automobiles, he received a severe strain which resulted in serious injuries; that following the strain he was operated on for varicocele veins and died on or about March 28th, 1928 (R. 3 and 4).

The Petitioner filed a plea to the jurisdiction on the ground that deceased, Hal Cook, was injured while performing services on a vessel anchored in navigable waters and, therefore, the cause was referable exclusively to the maritime jurisdiction of the United States District Court; and subject to its plea to the jurisdiction, it filed a general denial (R. 12 to 15).

Said cause came on for trial the 25th day of April, 1928, and on April 26th, 1928, the jury returned a verdict in favor of Respondents upon which judgment was entered against Petitioner for the sum of $7,200.00, being 360 weeks' compensation at the rate of $20.00

per week, the maximum provided by the Texas Workmen's Compensation Act.

D. Proceedins in the Circuit Court of Appeals.

On July 9th, 1928, Petitioner served personal notice upon Respondents that it was appealing from the judgment, which notice was filed with the Clerk of the United States District Court on July 11th, 1928 (R. 23), and on July 11th, 1928, Petitioner filed petition for appeal, which was by the District Court on the same day allowed and supersedeas bond fixed at ten thousand dollars ($10,000.00) (R. 25 to 27).

Assignments of Error were filed on July 11th, 1928 (R. 81). Supersedeas Bond was approved and filed on July 11th, 1928 (R. 83 and 84). On July 11th, 1928, Bill of Exception was approved and filed (R. 80).

On March 29th, 1929, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court holding Petitioner's Assignments of Error without merit (R. 93). Justice Foster dissented (R. 93). Petition for Rehearing was filed in said Court on the 11th day of April, A. D. 1929 (R. 95), which was overruled by the Court on April 23rd, A. D. 1929 (R. 99).

Petitioner filed an application for stay of mandate and execution for the purpose of applying to this Court for Writ of Certiorari (R. 99). On the 24th day of April, A. D. 1929, one of the Judges of the Circuit Court of Appeals entered an order staying the man-

date of that Court until the 24th day of May, 1929 (R. 100-101).

E. Errors of the Circuit Court of Appeals Complained of by Petitioner.

The United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the Texas Workmen's Compensation Act, providing for compensation for accidental injuries and death to employees applied where the deceased employee sustained an accidental injury while in the hold of a vessel unloading the same, which vessel was lying in navigable waters and while said employee was engaged in the performance of a maritime act and within the scope of his employment, because the said cause of action, if any, was exclusively within the maritime jurisdiction of the United States District Court.

2. In holding that there was evidence of more than a scintilla showing that the deceased employee received an accidental injury within the course of his employment which resulted in his death.

II.

Summary of General Reasons Relied on for Allowance of the Writ.

1. The holding of the Circuit Court of Appeals that Title 130 of the Revised Civil Statutes of Texas, 1925, known as the Texas Workmen's Compensation Act, was valid and applicable to this case is in conflict with

and repugnant to Article 3, Section 2, of the Constitution, extending the judicial power of the United States "to all cases of admiralty or maritime jurisdiction." (See Brief.)

2. The decision of the Circuit Court of Appeals for the Fifth Circuit is not supported by the decisions of the Supreme Court or of any Circuit Court of Appeals of any other circuit. (See Brief.)

3. The dissenting opinion of Justice Foster is in harmony with Article 3, Section 2, of the Constitution and the decisions of the Supreme Court and should be declared as the law in the case at bar.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein, which was entitled in that Court (Employers' Liability Assurance Corporation, Ltd., of London, England, Appellant, *versus* Mrs. Myrtis Cook *et al.*, Appellees,) to the end that said case may be reviewed and determined by this Court as provided in Judicial Code, Section 240, and that petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act, and that said judgment of the Circuit Court of Appeals of said case may be reversed by this Hon-

orable Court and judgment rendered for Petitioners; or, in the alternative, that the judgment of the Circuit Court of Appeals be reversed and remanded for new trial.

Respectfully submitted,

WM. A. VINSON,
CLYDE A. SWEETON,
Solicitors for Petitioner.

VINSON, ELKINS, SWEETON & WEEMS,
Of Counsel.

THE STATE OF TEXAS,
County of Harris:

I, Clyde A. Sweeton, being duly sworn, do hereby say that I am one of the counsel for the Petitioners; that I prepared the foregoing Petition, and that the allegations thereof are true as I verily believe.

I also certify that in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner for certiorari should be granted.

CLYDE A. SWEETON.

Subscribed and sworn to before me by Clyde A Sweeton, this the 27th day of April, A. D. 1929.

[SEAL.] E. D. ADAMS,
Notary Public in and for Harris County, Texas.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 81

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

versus

MRS. MYRTIS COOK ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

By WM. A. VINSON,
CLYDE A. SWEETON,
Solicitors for Employers' Liability Assurance Corporation, Ltd., of London, England.
VINSON, ELKINS, SWEETON & WEEMS,
Of Counsel.

(34,194)

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List of Authorities Cited in Brief.

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Madison Coal Corporation v. Industrial Commission, 150 N. E., 45	13
Manning v. Mutual Life Insurance Company, 100 U. S., 696; 25 L. Ed., 761	12
Midland Valley Railroad Company v. Fulgham, 181 Fed., 91	12
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 885

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

versus

MRS. MYRTIS COOK ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States of America:

The Employers' Liability Assurance Corporation, Ltd., of London, England, in support of its petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit in the case of Employers' Liability Assurance Corporation, Ltd., of London, England, Appellant, *versus* Mrs. Myrtis Cook *et al.*, Appellees, No.

5395 on the docket of that Court, respectfully submits the following brief:

First Proposition.

Where an employee, while engaged in the performance of his contract of employment, is injured in the hold of a vessel engaged in interstate commerce, and while said vessel is anchored in navigable waters of the United States, the Texas Workmen's Compensation Act is inapplicable and cannot be enforced and applied against compensation insurer in a court at law, because the said act is in conflict with and repugnant to Article 3, Section 2, of the Constitution, extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."

STATEMENT.

It was affirmatively alleged by appellees that the deceased sustained the injury complained of while he was assisting in unloading a vessel anchored in the Ship Channel at Houston, Texas, in navigable waters of the United States (R. 3 and 4). The alleged injury to deceased occurred while he was in the hold of the vessel "Lake Gorian," unloading automobile parts (R. 28 and 29), the vessel lying in navigable waters of the United States.

It was shown without dispute that the Ford Motor Company owned two ships at the time in question which it used in its regular business, and during the time of such ownership it engaged in commerce upon

the high seas. It was further shown that all employees, including the deceased, signed an employment slip agreeing to do any kind of work required of him by the Ford Motor Company, and that in unloading the boat, "Lake Gorian," the deceased was performing services contemplated and provided by his contract of employment. These ships were in charge of captains and mates who had charge of the ships while in Houston (R. 30, 36 and 37).

The policy of Workmen's Compensation Insurance issued by petitioner to the Ford Motor Company, the employer of deceased, was limited to such employees as were within the scope of the Texas Workmen's Compensation Act (R. 34).

Part 1, Section 3, of the Texas Workmen's Compensation Act provides:

> "The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for. All compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of action and no such compensation and

> no part thereof or of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void (Acts 1917, p. 269; Acts 1923, p. 385)."

The Act is elective. Part 1, Section 3*a*.

The common-law defenses, contributory negligence, fellow-servants and assumed risk, are taken away by the Act. Part 1, Section 1.

It also describes a schedule of weekly payment for employee or beneficiary and provides for the Board to pass upon the claim and an ultimate right to proceed in court. Subscriber's employees do not contribute to the necessary cost of such protection. They are presumed to accept the plan and to waive all right to recover damages at common law or under any statute unless they give definite written notice to the contrary.

Part 4, Section I, of the Texas Workmen's Compensation Act defines "employee" as follows:

> "Employee shall mean every person in the service of another under any contract of hire, express or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course, business, trade, occupation or profession of his employer."

AUTHORITIES.

Northern Coal Company *v.* Strand, 278 U. S. 142.

Southern Pacific Company *v.* Jensen, 244 U. S. 205, 61 L. Ed. 1098.

Atlantic Transport Company *v.* M. Imbrovek, 234 U. S. 59, 58 L. Ed. 1208.

Mussel *v.* Foundation Company, 274 U. S. 430, 71 L. Ed. 1135.

International Stevedoring Co. *v.* Haverty, 272 U. S. 51, 71 L. Ed. 157.

Washington *v.* Dawson & Company, 264 U. S. 226, 68 L. Ed. 652.

Knickerbocker Ice Company *v.* Stewart, 253 U. S. 156, 64 L. Ed. 835.

New England, etc., Company *v.* Dunham, 78 U. S. 27, (11 Wallace 1, 27); 20 L. Ed. 98.

North Pacific Steamship Company *v.* Hall Brothers Marine Railway & Ship Building Company, 249 U. S. 125, 63 L. Ed. 510.

Southern Railway Company *v.* Railroad Commission, 236 U. S. 437, 59 L. Ed. 661.

Argument.

We respectfully submit that there is no distinction between the case at bar and the case of Northern Coal Company *v.* Strand, *supra*, the latest decision by the Supreme Court dealing with Workmen's Compensation Acts. In that case Strand's employment contemplated labor both upon the land and the water, and when killed, he was performing services on a vessel lying in navigable waters. The facts showed that he spent about two per cent (2%) of his time unloading vessels. It was contended in that case, as by the Circuit Court of Appeals in the case at bar, that as he spent so little of his time unloading ships, it was a

matter of pure local concern over which the State of Wisconsin could legislate. The Supreme Court in reversing judgment of the lower court held:

> "The unloading of a ship is not a matter of pure local concern. It has direct relation to commerce and navigation and uniform rules in respect thereto are essential. The fact that Strand worked for a major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when his accident occurred."

The policy issued by petitioner in the case at bar expressly limited its application to such employees as were within the scope of the Texas Workmen's Compensation Act. Therefore, it could not be held liable under the Texas Law and under its policy for accidental death to a seaman engaged in interstate commerce. It follows, we think, that it cannot be successfully contended that the Company consciously contracted with its employees pursuant to the Texas Workmen's Compensation Act in so far as their duties and services were to be performed on vessels in navigable waters.

The employee's contract of employment unquestionably contemplated the performance of services upon the vessels of his employer. Therefore, it was a maritime contract.

The Supreme Court in the case of New England, etc., Company *v.* Dunham, 11 Wallace, 1 at 26, said:

> "Secondly, as to *contracts*, it has been equally well settled that the English rule which con-

> cedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making *locality* the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract having reference to maritime service or maritime transactions."

The Honorable Circuit Court of Appeals reasons that because the injury to the employee in the case at bar was not caused by tort, but was a pure accident and there was no relief in admiralty, that the State of Texas could properly and legally legislate upon the subject. We submit this position is not sound. Congress is given exclusive jurisdiction over all matters of admiralty and admiralty jurisdiction. Its failure to make provision in admiralty for accidental injuries does not leave the field of legislation in that respect open to the States. Southern Pacific Company *v.* Jensen, *supra.*

In the case of Southern Railway Company *v.* Railroad Commission, *supra,* the Supreme Court said:

> "The test, however, is not whether the State Legislation is in conflict with the details of the Federal Law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had asserted its exclusive control."

The cases of Southern Pacific *v.* Jensen, *supra,* and Northern Coal Company *v.* Strand, *supra,* did not involve torts, but accidents.

The Honorable Circuit Court of Appeals attempts to distinguish the case at bar from the case of Northern Coal Company *v.* Strand on the ground that the Wisconsin Workmen's Compensation Act is compulsory and the Texas Workmen's Compensation Act is elective. We believe the reasoning of the Court in reaching this conclusion is fallacious. Congress being given by the Constitution exclusive jurisdiction to legislate with respect to all cases of admiralty, and it having referred the exclusive jurisdiction in such cases to courts of admiralty, parties cannot by consent confer jurisdiction upon any other tribunal.

We invite the court's attention to the case of Peters *v.* Veasey, 251 U. S. 121, 64 L. Ed. 180, wherein the Supreme Court held an optional compensation act to be inapplicable to an injury on maritime waters in the course of maritime employment.

The Supreme Courts of Texas and Massachusetts have expressly held there is no distinction in cases under compulsory and elective compensation statutes.

In the case of Bill *vs.* Surety Casualty Company, 267 S. W. 531 (writ of error refused by the Supreme Court of Texas), the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas quoted the Supreme Court of Massachusetts in Duart *v.* Simmons, 121 N. E., page 10, as follows:

> "The ground of the Jensen decision as we understand it is that the kind of legislation represented by Workmen's Compensation Acts is beyond the jurisdiction of the states so far as it relates to admiralty and maritime affairs.

> The reasoning of that decision seems to us to apply equally to an elective as to a compulsory Workmen's Compensation Act. Consent of parties cannot confer jurisdiction. A statute which in its nature is outside the jurisdiction of the state, because within the exclusive domain of the federal government, cannot confer rights or be a bar to the enforcement of common-law obligations."

Under the Texas Workmen's Compensation Act, if an employer may legally become a subscriber and does not avail himself of such privilege, his common-law defenses are denied him. The act is compulsory to this extent and for that reason, if no other, the distinction made by the Circuit Court of Appeals should not be upheld.

The Circuit Court of Appeals cites with approval the case of Grant Smith-Porter Ship Company *v.* Rohde, 257 U. S. 469. That case is inapplicable to the case at bar for the reason that the injured party was performing services on an incomplete vessel in navigable waters. The uniform decisions of the Supreme Court are to the effect that services performed and to be performed on an incompleted vessel are non-maritime. Mr. Justice McReynolds, in speaking for the Supreme Court in the Rohde case, said:

> "The contract for constructing the 'Ahala' was non-maritime and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce."

Neither is the case of Millers' Indemnity Underwriters *v.* Braud, 207 U. S. 59, relied upon by the Circuit Court, in point. In the Braud case the employee went down into the water from a small barge for the purpose of sawing off timbers from an abandoned set of ways once used for launching ships, and while under the water the air supply failed and he died of suffocation. He was certainly not engaged in navigation nor interstate commerce, and, as we understand the decision, it was based upon the theory that the timbers were part of the shore docks.

Second Proposition.

Where beneficiaries of a deceased employee in a suit under the Texas Workmen's Compensation Act claimed that the primary cause of deceased's death was secondary anemia, and that the contributing cause thereof was thrombosis of the mesenteric veins following a strain in the course of his employment, the burden was upon them to show by direct and positive evidence, either that deceased strained himself or sustained a thrombosis of the mesenteric veins, and as there is no direct and positive evidence that deceased either strained himself or sustained a thrombosis of the mesenteric veins, the judgment is contrary to the law and evidence in that it is permitting a judgment to stand by basing a presumption upon a presumption.

STATEMENT.

On January 25th, deceased, together with two other employees, were unloading various automobile parts

ranging in weight from one hundred to two hundred fifty (100 to 250) pounds, which was heavy, straining work. After they had been working in the hold of the vessel about two hours, deceased complained of his back. These witnesses did not see the deceased suffer any character of injury, and he never told them he injured himself (R. 28, 29, 31, 42, 43 and 60).

Dr. James A. Hill examined him on February 10th, 1927, and found a slight mass of varicose veins along the left cord and upper portion of the scrotum, and on February 11th he was operated on by Dr. C. V. Barnes for varicocele (R. 45, 69 and 70). The deceased gradually grew worse following the operation for varicocele until his death, May 28th, 1928 (R. 40).

The varicocele condition and operation did not contribute in any way to the death of deceased (R. 54 to 56, 63, 69 and 70).

The primary cause of deceased's death was secondary anemia, and his physician gave his opinion that the contributing cause was thrombosis (blood clot) in the mesenteric veins following a strain while working for the Ford Motor Company (pages 46 and 47, Brief). There was no positive testimony that deceased did sustain a thrombosis. The hospital chart indicated that deceased's temperature became elevated after the operation which indicated that infection had set in (R. 51 and 52).

There was testimony that thrombosis usually follows an organic condition, and that after a thrombosis of the mexenteric veins forms, a man, without surgical intervention, would live from two to four days;

that secondary anemia did not usually follow thrombosis (R. 64 and 65). Deceased was not suffering from thrombosis at the time he was examined on February 10th by Dr. James A. Hill (R. 70). The trial court charged the jury that the case was one purely of circumstantial evidence (R. 76).

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Manning *v.* Mutual Life Insurance Company, 100 U. S. 696, 25 L. Ed. 761.

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Madison Coal Corporation *v.* Industrial Commission, 150 N. E. 645.

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Mt. Olive, etc., Co. *v.* Industrial Commission, 151 N. E. 592.

Alpert *v.* Powers *et al.*, 119 N. E. 230.

Argument.

The Supreme Court, in the case of United States *v.* Hass, 92 U. S. 282, 23 L. Ed. 708, lays down the following rule:

> "No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., page 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and the evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

The Supreme Court of Texas, in the case of Joske *v.* Irvine, 44 S. W. 1063, overturned the scintilla-evidence doctrine in this state and clearly announced the rule that no inference of fact can be drawn from premises that are uncertain. The court in the course of the opinion said:

> "Facts upon which an inference may legitimately rest must be established by direct evidence, as if they were the facts in issue. One presumption cannot be based upon another presumption. 16 Cyc. 1051; Mo. Pac. Ry. Co. *v.* Porter, 73 Tex. 307, 11 S. W. 324. No fact or circumstance was proved in this case which justified that presumption that the pipe was placed upon the track of the railroad by any person under the control of Armour & Co."

Applying the above rules to the case at bar, it is obvious, we submit, that this case does not have any evidence to support the judgment of more than a mere scintilla.

There is no positive testimony in the record that the deceased strained himself. It may be inferred from the kind and character of work that he was doing and his previous good health that he did strain himself, but upon this legitimate presumption there must be indulged a further presumption that in straining himself he sustained thrombosis of the mesenteric veins, and upon these presumptions base the further presumption that the thrombosis of the mesenteric veins caused secondary anemia, the primary cause of the death of the deceased. By doing so, a presumption

is based upon a presumption and inferences of fact drawn from premises which are uncertain.

Respectfully submitted with prayer that judgment be reversed and cause rendered in favor of Petitioner; or, in the alternative, reversed and remanded.

CLYDE A. SWEETON,
WM. A. VINSON,
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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

October Term, 1928

NO. [redacted] 81.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, Petitioner

Versus

MRS. MYRTIS COOK, ET AL., Respondents

BRIEF AGAINST PETITION FOR WRIT OF CERTIORARI

D. A. SIMMONS,
SAM C. POLK,
IRA J. ALLEN,
Solicitors for
Mrs. Myrtis Cook, et al.,
Respondents.

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(34,194)

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SUPREME COURT OF THE UNITED STATES

October Term, 1928

No. 885

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, Petitioner

Versus

MRS. MYRTIS COOK, ET AL., Respondents

BRIEF AGAINST PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Mrs. Myrtis Cook, for herself and as next friend of Geraldine Cook, a minor, Respondents, respectfully submits the following brief against the application of Petitioner for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit in the above entitled cause:

FIRST COUNTER PROPOSITION
(To Petitioner's First Proposition)

Where an employee contracts to work for an employer as a mechanic in employment that is non-maritime in its na-

ture, and the employer insures itself against liability for accidental injuries to the employee received in the course of his employment, under the provisions of an elective state compensation act, which provides an exclusive remedy to the employee for all compensable injuries so received, which both the employee and employer elect to accept, and the employee continues such work, as a mechanic in a Ford assembling plant for more than three years, and is injured in the hold of the employer's vessel where he was ordered to go to assist in the unloading of his employer's cargo from his employer's ship, the enforcement of the rights of the employee under the provisions of the state compensation act, which both the employee and employer have elected to accept, does not work a material prejudice to any characteristic feature of the general maritime law, and is not in conflict with the Constitutional provision extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."

STATEMENT

Respondents affirmatively alleged and proved that deceased was employed on July 10, 1923, as a mechanic by the Ford Motor Company and worked as such for more than three years in the assembling plant at Houston, Texas, both parties contracting with reference to and electing to be bound by the provisions of the Workmen's Compensation Act, of the State of Texas (R., 34 and 35.) It was further shown that eighteen months thereafter, on December 20, 1924, the Ford Motor Company sent its ship loaded with its automobile parts to Houston, and during the following twenty-five months, at irregular intervals, sent six additional shiploads of its parts in its ships to Houston. It was shown that the deceased assisted in unloading one of these ships on December 16, 1926, nearly three and a half years after his employment, and again on January 26, 1927, on which last named date, while in the hold of the vessel, he sustained injuries which caused his death.

The Workmen's Compensation Act of the State of Texas is wholly elective as to both the employee and the employer and

either may refuse to be bound or cease to be bound thereby by complying with the provisions of the law as will appear from the sections of said Act pertinent to this case which are included in this brief as Appendix A.

AUTHORITIES

Alaska Packers Association vs. Industrial Commission, 72 L. Ed, 415; 48 Sup. Ct. Rep., 346.

Grant Smith-Porter Ship Co., vs. Rhode, 257 U. S. 469; 66 L. Ed., 321; 42 Sup. Ct. Rep., 157.

Berry vs. Donovan & Sons, 115 Atlantic, 250.

Millers' Indemnity Underwriters vs. Braud, 270 U. S., 59; 70 L. Ed., 470; 46 Sup. Ct. Rep., 194.

Lindberg vs. Southern Casualty Company, 15 Fed. (2d) 54; 18 Fed. (2d), 453; certiorari refused 274 U. S., 759; 71 L. Ed., 1337; 47 Sup. Ct. Rep., 769.

State Industrial Commission vs. Nordenholt Corporation, 259 U. S., 263; 66 L. Ed., 933; 42 Sup. Ct. Rep., 473.

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Ketchikan L. & S. Co. vs. Bishop, 24 Fed. (2d), 63.

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Ex Parte Rosengrant, 213 Ala., 202; 104 So., 409 (affirmed 273 U. S., 664; 71 L. Ed., 829; 47 Sup. Ct. Rep., 454.)

Oakland vs. Industrial Commission, 198 Cal., 273; 244 Pac., 353.

London Guarantee Accident Co. vs. Industrial Accident Commission, 265 Pac., 825.

Atlantic Coast Shipping Co. vs. Royster, 148 Md., 433; 129 Atl., 668.

Toland's Case, 258 Mass., 470; 155 N. E., 602.

Southern Surety Co. vs. Crawford, 274 S. W., 280 (certiorari denied, 270 U. S., 655; 70 L. Ed., 783; 46 Sup. Ct. Rep., 353.)

Scott vs. Dept. of Labor and Industries, 130 Wash., 598; 228 Pac., 1013.
Eclipse Mill Co. vs. Dept. of Labor and Industries, 141 Wash., 172; 251 Pac., 130.
Rickert vs. Industrial Accident Commission, 56 A. L. R., 848.

ARGUMENT

This action sounds in contract rather than in tort. No negligence on the part of the employer was alleged or proved. No action in admiralty could have been sustained for the injuries received by reason of that fact, in fact the employee had voluntarily contracted away his right to resort to any remedy other than the exclusive remedy provided by the State compensation act for parties electing to abide thereby. Therefore, no violence is done to any characteristic feature of the general maritime law by enforcing the provisions of the Workmen's Compensation Act of Texas, in contemplation of which employee and employer had contracted nearly three and a half years prior to the employee doing any work of a maritime nature (R. 35.) The parties had sustained the relationship of employer and employee for a long period of time, during which the work of the employee was solely that of a mechanic in an automobile assembly plant. During that time, without doubt, the employee was protected by the provisions of the Compensation Act. He was then ordered by his employer to help unload his employer's ship, and in doing that he sustained an injury which resulted in his death. No cause of action in admiralty could have been made because no single act of negligence could have been proved. With this state of facts, can it be said that to enforce the contract consciously entered into by the parties at the time of employment and continued for a long period of time would necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of the law in its international or interstate relations? We most respectfully insist that it would not.

This Court said in the case of Grant Smith-Porter Ship Co. vs. Rohde, supra:

"The injury was suffered within a state whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund, it can not properly be said that they consciously contracted with each other in contemplation of the general system of maritime law."

And again in the case of Millers' Indemnity Underwriters vs. Braud, supra, (which arose in Texas) which involved a maritime tort, this Court said:

> "In the case now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

And in the more recent case of Alaska Packers Association v. Industrial Accident Commission this Court further emphasized the decisions above quoted from. Peterson was employed to do work on the water as well as on land; and this Court summarily disposed of the contention of appellant that when injured Peterson was doing maritime work under a maritime contract, and therefore was not within the provisions of the California Compensation Act, by stating:

> "Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction, we need not stop to determine. Even if an affirmative answer be assumed, the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the

parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law."

In the case of Rickert v. Industrial Accident Commission, supra, the Supreme Court of Oregon said:

"This is not a case of actional negligence arising upon the navigable waters of the state or elsewhere. The facts do not constitute a tort, nor an actionable injury, but a simple accident, without fault on the part of any person. Under the provisions of the Workmen's Compensation Act, compensation is to be made to the injured workman without regard to fault or other cause of the injury. The work of plaintiff as a longshoreman, in which he was engaged at the time he sustained his injury, was maritime in its nature. His contract of employment was maritime, and the accidental injury sustained by him in the course of such employment was maritime. So. P. Co. v. Jensen, supra. The rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. But notwithstanding the nature of his employment at the time he was injured, the contract between employer and employee with reference to their rights and liabilities was a lawful one, and did not offend against any superior law."

To the same effect is the decision of the Supreme Court of Oregon in the case of West v. Kozer, 104 Oregon, 94; 206 Pac., 542, which reads in part as follows:

"The casualties and injuries described in the writs appear to have been pure accidents, for which no one was responsible or to blame. No 'case' in law or equity could arise from such untoward evidence. There is nothing out of which can be constructed a 'case' for any court; and since there is no 'case' the inhibition of the national Constitution form no obstacle to the relief here sought by the petitioners."

Referring still further to decisions of the courts of last resort in the states, we quote from the case of Berry v. Donovan & Sons. Donovan & Sons, a stevedoring corporation, contracted to unload a ship and employed Berry to assist in the work, and in the course of his employment he was injured. The court said, in part:

> "In the case in hand, the plaintiff is not attempting to enforce a suit in rem against the vessel, nor is he attempting to prosecute a suit in personam against her master or her owner, nor to extend a contractural relationship born of state legislation beyond an immediate party, or the insurance carrier of the immediate party, to the contract. His attitude is that he and his employer, enjoying constitutional freedom to contract, voluntarily put aside rights and obligations otherwise vouchsafed to them, and therefor substituted the new form of compensating industrial injuries which the legislature of their state has provided. Having done this, and injury having befallen the plaintiff out of and in the course of his employment, he insists that this court make their contract to square with the demands of real justice and plain common sense, that his rights in the dual citizenship of state and nation may not be unjustly infringed, and that the remedial legislation out of which the contract sprang may be judged by what it achieves in satisfying the righteous demand of society for a justice that is exact, equal, and full. **** In all this there is no attempt to hinder, restrain or regulate commerce; no effort to establish, as against the vessel or her owner, a form of personal-injury compensation or of death benefit given by a state statute but unknown both to the admiralty and to the common law; no purpose to make a symmetry in the customs and ordinances of the sea."

In the instant case the parties can not be said to have "consciously contracted with each other in contemplation of the general system of maritime law," in fact they consciously contracted to be bound by the Compensation Act. In the

case of Northern Coal Company v. Strand, 278 U. S., 142, recently decided by this Court, the employee was regularly employed to do work on shore and on navigable waters unloading barges, and we submit that the decision in that case has no application here. All the cases on this point cited by petitioner in his brief, so far as we have been able to construe them, relate to injuries to longshoremen and stevedores who were engaged in maritime employment, and who must, therefore, be held consciously to have contracted with their employers in contemplation of the general system of maritime law, and the law as set forth in the decisions in those cases is not applicable to the facts in the instant case, where the contract was a lawful one between the parties and wholly non-maritime.

SECOND COUNTER PROPOSITION

(To Petitioner's Second Proposition)

There was ample evidence to justify the jury in finding for the Respondents (plaintiffs in trial court) and to support the judgment entered on such finding.

STATEMENT

Hal Cook was employed July 10, 1923, and worked for the Ford Motor Company for a little over three and one-half years. (R., 35.) During all that time he had been an exceptionally, strong and robust man:

> "I had known Hal Cook several years. I roomed at the same place he did one time. I would say that his age was around twenty-five; something like that. He was a little bit heavier built, I believe, than I am and not quite as tall. Ever since I knew him he was a good and healthy, strong man, able-bodied man. He worked all the time in the automobile plant of the Ford Motor Company. I never did know him to leave there sick or anything at any

time. He was always healthy and worked every day that he possibly could." (From testimony of E. B. Flukinger, witness for appellee. R., 29.)

"I had known Mr. Cook two years and four months prior to our marriage. He was six feet tall and weighed 165 pounds. He was engaged in his employment continuously over there at the Ford Motor Company. Mr. Cook was never sick while I lived with him prior to that time. He had a cold once in a while, but he never missed any work from being sick. Mr. Cook did not have any blemishes. He was in perfect health. I do not know of his ever being ill prior to the time I met him. He never stated that he had suffered any accidents or anything of that sort." (From testimony of Mrs. Myrtis Cook, R., 40.)

To the same effect is the testimony of J. A. Petrosky, (R., 41 and 42); of H. O. Windell (R., 57, 58 and 59) and of W. A. Tolar, witness for the petitioner, (R., 62) from all of which testimony it conclusively appears that Cook had never lost any time on account of illness during his employment; that he had no prior accidents or predispositions that would in any way disable him; and that on the night of twenty-fifth of January, 1927, he left home in good health and went to the boat with two of his companions, a strong, healthy and well man. (R., 38 and 44.)

Cook worked in his usual manner for about two hours, in no way complaining or showing any evidence of any disability of any kind.

"I stated that when I went down there and started to work that night, Hal Cook was with me. It was about two hours before he slacked up on his work. I could not tell the difference in his work until then. From that time on up until he stopped I could tell a difference in his work. After the two hours he complained of his back. From the beginning up until he complained of his back he was all right. Before that time I could not tell any differ-

ence in him, that he was hurt or anything." (R., 59.)

In the lifting of the car parts in the boat, a workman did not have one person with whom he worked at all times, but the men in the same hatch would work with first one and then another. (R., 61 and 29.)

A workman working in the hatch would not necessarily have seen what happened to a person with whom he happened not to be working at the time:

> "If he had slipped or fallen there I would not necessarily have seen it." (Testimony of Mr. Petrosky, R., 60.)

The kind of labor that was being done was very heavy and the workmen were forced to do their lifting in a bent-over position:

> "We were unloading all kinds of parts, axles, front axles, springs and small parts. There were also batteries in there and rear axles. Those batteries were loaded four or five in a crate. I could not say how much they weighed. They would weigh approximately between 100 and 125 pounds. They were crated length-ways, five batteries in a length. I suppose those rear axles would weigh about 200 or 250 pounds. It took two men to handle them, one man on each end of the axle. (R., 42.) *** I consider the work down there unloading those parts heavy work. ***
>
> "I lifted some of that material with him. We were lifting rear axles, truck axles and also touring axles. Those things were stacked four this way and four that way. They were stacked from the bottom of the boat to the top, just as far as they went, axles and different things on top, small parts. As far as I recollect, there were small axles first, and then truck axles, and then small parts. In getting out that stuff we had to be on top of those axles and had to lift them out. We had no room to stand straight up." (R., 60.)

After Cook had worked about two hours his disability was first noticed as testified to by Mr. Petrosky as follows:

> "Cook went in there the same time I did to work, and he stayed in there an hour or two hours, something like that, before I missed him, and he was complaining of his back. He said his back was hurting him so bad that he thought he would have to go home, and he went up to see his boss. I heard him state that about his back hurting him. He was talking to me at that time when he complained of his back. He was standing up there holding his hand on his back. He had both hands in the small of his back like that, and said his back was hurting him. He seemed like he did not have any get-up about him. He went on deck, and I did not see him after that." (R., 42 and 43.) ***

> "I was working right there with him unloading that boat. The only thing I ever heard him say was that his back was hurting him. I never did hear him say that he received an injury of any kind or character while I was working there. (R., 43.) I stated that when I went down there and started to work that night Hal Cook was with me. It was about two hours before he slacked up on his work until then. From that time on up until he stopped I could tell a difference in his work. After the two hours he complained of his back. From the beginning up until he complained of his back he was all right. Before that time I could not tell any difference in him, that he was hurt or anything." (R., 59.)

The testimony of Mr. Flukinger in regard to what happened to Cook on the boat is as follows:

> "I do not remember whether I saw Mr. Cook when he quit work. I remember seeing him go out of the hatch. I do not know how come him to go out of the hatch, but I saw him when he was climbing up out of the hold. He complained of his back before he left, before he went up out of the hold. We would

say, 'Cook, stand over to one side and don't work if you don't feel like it.' And we asked him how come he didn't go home. When he would stand up and he would hold his hands on his hips, on his back, standing up against the side of the hatch. When he left that was the last I saw of him, when he was climbing up out of the hatch." (R., 29.) ***

"It was after we had worked there several hours that he complained that his back was hurting. We had been working there quite a while when he left the ship. I could not say just how long it was. It had been so long since this happened I could not give you an idea in hours.

"Mr. Cook at no time ever told me that he injured himself in any way, shape, form or fashion. After he worked down in the ship for a while he just complained that he was sick and that his back was nearly killing him. Then after he started complaining he would hold his back with his hands every time he had a chance. I do not remember that he said his back was nearly killing him, just that way, but he said he was hurt or his back was hurting him, something like that. I could not say just what he said." (R., 31.)

Cook went home from the boat and had very excruciating pains thereafter, such that it was necessary to take opiates to relieve the pain. (Testimony of Dr. Dawes, R., 32 and testimony of H. O. Windell, R., 58.)

Cook was unable to go to work the next day and never worked thereafter. (R., 38.)

After neither the Ford Plant doctor, Dr. Whitehouse, nor the doctor to whom Cook was sent by Dr. Whitehouse, to-wit: Dr. James A. Hill, had done anything to relieve the pain, Cook called Dr. Carl F. Barnes. (R., 39.) Dr. Barnes gives very positive statements of what he did and found, as follows:

"I was called to wait on Mr. Hal Cook. I do not

remember the name of the street where I first saw him, but it was out toward the car barns. It was at his home.

"The man was suffering excruciating pain when I saw him, pains that started somewhere in the abdomen and went downward and settled in his testicles. That is the way he expressed it. The left testicle was affected. The testicle was slightly swollen. There was a varicose condition in the scrotum.

"I operated on him and removed a section of the vein. That operation healed up properly. I do not know how long it took for that to heal. It healed in about the ordinary time, seven or eight days, something like that.

"After I operated on this man I continued to go to see him. For about two or three days the man got relief. After that the pain came back as severe as it ever was, if not more so. For about two or three days the man seemed to have gotten relief from that pain, but after that it was just as severe as it was before, if not more so. The man complained all the time of suffering pain in the abdomen; that is somewhere in about this place, and that pain would go downward toward his testicles all the time. The pain, he said, would start on the inside and go down and settle in his testicle.

"When I first made an examination of this man he was suffering pain. He told me at that time what he considered was the matter with him. He said he was working unloading some parts to a car, axles, if I remember correctly, and that he felt something give way on the inside of him, is the way he expressed it, and he suffered pain and felt fainty, and I think he told me he asked his boss something about it and he let him on some lighter work that night, and from then on he had pain. That is about what he told me.

"After I had operated on him for this varicose

vein and had removed it, I found it necessary to remove him to the Methodist Hospital for the purpose of giving him better treatment out there and seeing him oftener each day. I suppose I saw him on the average of twice a day during the time he was out there. I think one day I went five times. ***

"My idea is that it was strain, that lifting, just like the blood vessels anywhere else, in your head or any other part of your body. That is my judgment, it was a ruptured blood vessel.

"A strain, something like that, lifting, will cause varicose veins. That is one of the most prevalent causes. ***

"When a man loses blood he becomes pale and becomes slightly jaundiced or yellow because he has not enough red blood cells to make the red color. He loses weight.

"This patient continued to lose weight. He was not weighed, but he continued to lose, by the looks of him.

"The record shows that he stayed there from the first of March until the twenty-third of March. It was my judgment when he went home that he could not get well. That was my idea about it. He died fifteen days after that. ***

"Assuming to be correct what the deceased told me, that he was lifting something out of there on this boat, and that he felt something tear loose inside, and that was the history of the case so far as I knew, it would logically follow as a pathological proposition that this could happen.

"The primary healing of that operation was all right. It healed up primarily just like all wounds heal up. I can not see why that could have caused this condition. I can not see any reason why it could have.

"It would be my diagnosis that this strain was the primary cause of this man's condition, and that he did rupture one of those vessels—which one I do not know—but he had symptoms of a ruptured vessel. The man had hemorrhages during the time I was waiting on him out there at the hospital. He had hemorrhages through the bowels. That would logically follow the rupture of a blood vessel inside.

"During the time this man was in the hospital I called in other physicians in this case in consultation. Dr. DeWalt and Dr. Kuebler, and Dr. Hayes, and Dr. Priester saw him. I called them in because it was an unusual case, to get their opinion. After having those consultations with those doctors I did not have any reason to change my treatment of the case. ***

"His body was just breaking down. We did not find any typhoid. My diagnosis was that he did not die from any of the different germs or different cocchi.

"The condition that I operated for was simple varicocele. I never heard of anybody dying from varicocele. It is an enlarging of the veins that supply the testicles and makes a knotty growth around the veins. A strain, standing on the feet and such as that might cause it. ***

"I believe from this history this man gave me he had a ruptured mesenteric vessel. There is a difference between a ruptured mesenteric vessel and varicocele. They are different veins altogether. He had varicocele, and I think he had this other besides. I really do not think the varicose condition had anything to do with his death. I think it had nothing whatever to do with his death. It was not sufficient to cause his death, unless by reason of the operation he got some infection, which he did not get. I do not believe I ever heard of a man dying from an operation for varicocele.

"I determined that there was apparently a thromboid condition there from the history of the case. The man gave a history of a fainty condition when he first became injured, got fainty and thirsty for water, like anybody who has lost blood, and I connected that up with the instant pain he had, radiating down in the pelvic region, following where those vessels would go.

"I would not think that varicose condition had anything to do with that. That was just a coincidence, something coming along with it. That is what I think about it.

"His temperature rose just about the time he was passing blood. My deduction is that that was caused from severe inflammation of the bowel wall, the little capallaries supplying the bowel becoming so saturated and breaking through and filling the bowels up with blood. That was about ten days after he claimed to have been injured. That is one reason that I made the diagnosis that I did. The blood vessels dam up and that is nature's remedy to try and relieve the congestion. That is my belief about it.

"If he had not given any history of having received any strain at all I would have said I did not know what in the dickens was the matter with him. When he gave the history of a strain that made a satisfactory reason for the conditions I found. It does look to me, with a man giving a history of lifting something, turning sick at the stomach, fainty like, and wanted water and had to have water right away, there was something happened like the rupture of a blood vessel and loss of blood. That is the way it looks. That is the history I took of him." (R., 45, 46, 47, 48, 53, 54 and 55.)

AUTHORITIES

Southwestern Surety Ins. Co. v. Owens, 198 S. W., 662.

Roland v. Employers' Casualty Co., 290 S. W., 895, (Affirmed 1 S. W., 2nd, 568.)

E. Baggot Company v. Industrial Commission et al, 7 A. L. R., 1611.

Elizabeth Patrick v. J. B. Ham Company et al., 13 A. L. R., 427.

Lindberg v. Southern Casualty Co., 15 Fed., 2nd 54.

Texas Employers' Ins. Assn. v. Shipley et al., 260 S. W., 646.

Gilliland v. Ash Grove Lime & P. Cement Co., 180 Pac., 793.

Manning v. Pomerene, 162 N. W., 492.

State ex rel. Puhlmann, 162 N. W., 678.

Kiercok v. Philadelphia & R. Coal & I. Co., 270 Pa., 17, 112 Atl. 746.

Clover, C. & Co. v. Hughes, A. C. (Eng.) 242.

Texas Employers' Assn. v. Jimenez, 267 S. W., 752.

Georgia Casualty Company v. Little, 281 S. W., 1902.

Security Union Ins. Co. v. Alsop, 1 S. W., 2nd, 921.

Miller's Indemnity Underwriters v. Schrieber, 240 S. W., 963.

Miller's Indemnity Underwriters v. Heller, 253 S. W., 853.

Consolidated Underwriters v. Free, 253 S. W., 941.

Travelers' Ins. Co. v. Smith, 266 S. W., 576.

Texas Employers' Ins. Assn. v. Davidson et al, 5 S. W., 2nd, 1008.

22 Corpus Juris, p. 84, Sec. 27.

ARGUMENT

The statement preceding the above list of authorities clearly indicates the quantum of proof before the jury in the trial of this case, and we submit that the same was ample to justify

its finding and support the judgment entered thereon. But before comparing the quantum of evidence in this cause with that adduced in the above cited cases, wherein the sufficiency of the evidence was questioned and held ample to support a judgment under the compensation acts of the respective judisrictions, we deem it appropriate first to consider the rule of construction of workmen's compensation statutes generally in the light of their purpose and then in the light of their application to specific fact situations.

No such strict construction as to what constitutes "proximate cause" is indulged in compensation cases as in cases of negligence. This rule is stated in the case of Georgia Casualty Co. v. Little, 281 S. W., 1094, as follows:

> "No strict construction of the term 'proximate cause' as used in the law of negligence, can be applied to compensation cases under our compensation statute (Vernon Sayles' Ann. Civ. St., 1914, arts. 5246h-5246zzzz.) Travelers' Ins. Co. v. Smith (Tex. Civ. App.) 266 S. W., 576. The courts have uniformly made a liberal interpretation and application of the Compensation Act so as to effectuate its purposes. Texas Employers' Ins. Assn. v. Jimenez. (Tex. Civ. App.) 267 S. W., 753; Employers' Liability Assn. Corp. v. Light (Tex. Civ. App.), 275 S. W., 685. And where the evidence has any probative force in support of the judgment we are not at liberty to disturb it. Ins. Assn. v. Jimenez, supra; Wade v. Madison, (Tex. Civ. App.), 206 S. W., 118."

The reason for the above designated policy in the construction of compensation statutes lies in the humane doctrine that the purpose of the passage of such acts is to place upon industry the costs of industrial accidents, as stated in the case of City of Milwaukee v. Miller, 154 Wis., 652, 144 N. W., 188, L. R. A., 1916A, 1 Ann. Cas., 1915B, 847 and quoted with approval by our courts in the cases of Roland v. Employers' Casualty Co., 290 Tex., 898, and General Accident Board v. Evans, 201 S. W., 705, as follows:

> "A proper administration of the Workmen's Com-

pensation Act requires appreciation of the manifest legislative purpose to abolish the common-law system regarding injuries to employees as unsuitable to modern conditions and conceptions of moral obligations, and to erect in place thereof one recognizing every personal loss to an employee, not self-inflicted, as necessarily entering into the costs of production, and required to be liquidated in the steps ending with compensation. *** The foregoing views aptly express, we think, those things that should serve as a guide in the interpretation of a statute like the one to which they relate."

The evidence in the case of Southwestern Surety Company v. Owens, 198 S. W., 662, was held to show an accidental injury suffered in the course of his employment. Writ of error was denied by the Supreme Court of Texas. Mr. Hinton of Randolph Paint Company testified that he was up on the floor where Owens was stacking paint several times during the day and Owens was at work, that a consignment of paint had been received during the day which was being stacked in the storage room upstairs and deceased was removing the cans that would weigh about 100 pounds from the elevator to the place where they were being stacked. Then Hinton testified about the injury as follows:

"I saw Will Owens that afternoon when he was unable to stack paint. I would say that it was right at six o'clock, maybe 15 minutes of 6 o'clock. I went upstairs at that time. I saw Will Owens when I got there. Will was leaning against a pillar or banister when I got there. There is just a short turn in the stairs, and a rail about two feet long, and there is a pillar at the turn, at the end of it. I saw symptoms of Will's being in pain. It was very evident, very pronounced. He had been bleeding from the mouth, and he was gasping somewhat for breath. He was spitting blood, and there was blood on his face, and he was gasping for breath. When I got there where he was standing there was a five-gallon kit of outside white paint near where he was standing. The

weight of that kit is approximately 100 pounds. He was stacking this paint five high. When I got there there were four actually up on the stack in front of Will, four already up. *** I would not be able to state definitely how long before this I had seen Will, but I do know that he was lifting paint there all that afternoon. Will said something to me there. He said he 'had done busted something lifting that can of paint.' After he said that I helped Owens to a seat, and he seemed to be in a pretty bad shape. He did not do any more work that day. As soon as he was able he was taken home. *** I do not think I ever saw him at the store after that. I saw him at his home just before he died. He died within a month or six weeks after that. Prior to this occurrence Will L. Owens suffered a little injury in the spring of the year, lifting a piano at the church. He was laid off only a very short time then. He came back to work after that. ***"

The court in its finding says:

"The evidence shows that in April, 1914, Will Owens was injured while lifting a piano, and as a result of such injury suffered for a week or ten days from hemorrhage from the lungs or chest."

Dr. Neuhaus, who had never seen the injured, testified as an expert, in substance that the most probable diagnosis as to the cause of the return of this hemorrhage on October 23, 1914, was that the little blood vessel which burst in April had burst again; "that the scarification caused this blood vessel to be weak, and it burst again," and the doctor further testified:

"Assuming that this patient gradually declines until December 10th, this injury being on October 23rd, and during that period he is troubled with fever, say the same symptoms followed the October 23rd injury as in April, and he gradually declined in strength and weight and died on December 10th, I would say that an infection of the lacerated place in

the lungs where the bleeding took place could cause that."

In the Owens case no person was present and saw any injury occur. Owens had burst a blood vessel in moving a piano at the church which had caused hemorrhages some seven months prior to the occurence at the paint company, the doctor had never seen or treated Owens and said that an infection of the old lacerated place could have caused the symptoms preceding Owens' death, yet evidence in this case was held sufficient under our compensation law and represents the weight of authority we believe in the United States as well as Texas, as is disclosed by the frequent following and citing of the case in this State and other jurisdictions as will appear from an examination of the annotated notes in 7 A. L. R., 1614 and 13 A. L. R., 438.

In view of the undisputed fact that Cook was an exceptionally robust, healthy and strong man, went to work in fine condition, after about two hours slacked up work in fainty condition, complaining with his back, and giving history to his doctor of something pulling loose in him, having hemorrhage of the bowels thereafter until he wasted completely away and died; and then the very doctor that treated him and saw him from day to day giving as his opinion after summarizing the whole case to the court, that there were no cocci present and that it was his opinion and belief that Cook ruptured a blood vessel which was the primary cause of his death (R., 54 and 55), we believe that this case presents a much stronger fact situation for the consideration of the jury than did the Owens case; and we further believe the Owens case is properly decided and is in keeping with the purpose and intent of the compensation law.

The facts proved in Roland v. Employers' Casualty Co., 290 S. W., 895, which case was appealed and affirmed by the Supreme Court of Texas, 1 S. W., 2nd, 568, were briefly as follows: Mrs. Roland sued to recover under the Workmen's Compensation Act of the State of Texas, for the death of Roland, a well driller, whom she alleged was injured while drawing some pipe from the well, in that he strained himself and thereby ruptured his appendix. The Industrial Accident

Board had refused to allow the claim and the trial court had denied recovery, but same was reversed and rendered on appeal to the Court of Civil Appeals and affirmed by the Supreme Court. One of the assignments of error was that there was no evidence showing that Roland had received an "industrial injury," during the course of his employment, from which he died. The court summarizes the evidence as follows, on page 899 of the report:

> "The evidence shows that Roland did most of the work around the well, especially in the absence of the driller, and that part of his duties was the lifting of heavy joints of pipe, some of which weighed 450 pounds; that at the time of the claimed injury he was doing this kind of work. Mr. D. C. Grove, the driller, testified that he came on duty on that well the morning that Roland received his claimed injury, and that there was lifting to be done; that he saw Roland lift a pipe at that time weighing about 450 pounds; . at after this lifting he saw Roland sitting down; this was an unusual thing for Roland to do; he gave evident signs of being in distress or pain; he did not look like a man who was fit to work; he looked like a man in pain, and certainly not in his ordinary health."
>
> "Dr. E. W. Wright testified that he treated Roland during his last illness, and that he found that he was suffering from a ruptured appendix; that in his opinion, a diseased appendix is more likely to rupture during exertion than while a person is lying still. He further testified that in his opinion, the perforation or rupture of the appendix occurred at a time agreeing with the time when Roland was doing this lifting, after which he sat down, evidently in pain."

Such was the evidence upon which the court in the Roland case reversed and rendered the judgment of the trial court and in its discussion of the sufficiency of the evidence, and to show the reason for its action, quotes, cites and comments as follows:

"Our statute (Title 130, Art. 8309, Subd. 5) under Section 1, Revised Statutes, defines the term injury as follows: 'The term "injury" or "personal injury," shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom.'

"In Babich v. Oliver Iron Mining Company, 157 Minn., 122, 195 N. W., 784, 202 N. W., 704, it is said:

"'A sudden and violent rupture or break in the physical structure of the body of an employee, caused by some strain or exertion *** is an accidental injury within the meaning of the Compensation Act, even though no external unforeseen event such as slipping, falling or being struck contributes thereto.'

(Court here quotes from Owens case, supra):

"In Fort Worth Mut. Benev. Assn. v. Miller, 280 S. W., 338 by this court, opinion by Chief Justice Connor, writ of error dismissed by the Supreme Court, it was held that the bursting of a blood vessel, while the injured was trying to push a car which had stalled in the sand, was an accident and the beneficiary of the accident policy was entitled to recovery.

(The court here quotes from General Accident Board v. Evans, supra, and City of Milwaukee v. Miller, supra, the section above quoted relative to entering into the cost of production the burden of industrial injuries and after citing a number of cases comments as follows):

"Most of these cases cited hold that injuries received internally but from some external force, or as the result of muscular contraction due to strain, constitute industrial injuries."

The court in the Roland case found on motion for rehearing that the evidence sustained the conclusion that the deceased prior to the alleged injury which preceded his death, had been suffering from some pain in his appendicital region, yet concluded that the evidence justified holding that Roland

had ruptured his appendix and that such predisposition to appendicitis would not preclude a recovery. On all the facts the testimony is stronger in the case before this court than that in the Roland case, in that there was no predisposition of Cook toward any kind of disability, and the doctor's opinion is based on logical, strong and undisputed history of the injury as well as hemorrhage of the bowels following the injury which can not be accounted for by natural causes such as appendicitis.

In the case of E. Baggot Company v. Industrial Commission, 290 Ill., 530; 125 N. E. 254; 7 A. L. R., 1611, the Supreme Court of Illinois had under consideration a case whose facts were less probative of an injury sustained in the course of employment than in this case. The evidence in that case showed the deceased, Cripp, was engaged in hauling up some pipes used in plumbing which weighed between 250 and 300 pounds. The lifting was being done by two men using a windlass. When the load was landed, deceased started to walk away from the windlass spitting blood, made no statements, "nothing unusual happened while the work of lifting the last load of pipe was in progress, the work was heavy, but it was the same kind of work that the two men had been doing for a couple of days." Hemorrhages continued for about 14 days and deceased died. It was held that deceased sustained an accidental injury in the course of his employment and that there was ample evidence to justify the industrial commission in its finding. The annotation following the report of this case in 7 A. L. R., is particularly valuable in giving a review of a number of similar cases where internal injuries caused hemorrhage.

In the case of Elizabeth Patrick v. J. B. Ham Company, 111 Atl., 912; 13 A. L. R., 427, the Supreme Court of Maine held that there was ample evidence to justify the decree of the commission in allowing a recovery for death of Patrick caused by cerebral hemorrhage. The evidence showed Patrick lurched slightly in swinging up two sacks of grain weighing about 100 pounds each, he being hold of one end and another workman lifting the other end. That on the third sack when Patrick stooped to catch hold of same he fell across the bag and was assisted to the office and died about eight

hours later without regaining consciousness. Two physicians testified that the cause of the death was cerebral hemorrhage, and there was testimony that deceased went to work after dinner in apparently healthy condition. The court held that the fact that Patrick was suffering from diseased arteries, predisposing him to cerebral hemorrhage was of no consequence. We submit that such facts are not nearly so strong as those in the instant case.

We believe that the cases hereinabove discussed are ample to disclose the decided weight of authority in compensation cases in reference to the quantum of evidence required where internal ruptures or strains are involved. However, we shall briefly review the quantum of evidence disclosed in a few of the other cases hereinabove cited. In Lindberg v. Southern Casualty Co., 15 Fed. 2nd, 54, certiorari denied by this court, the quantum of evidence was questioned where it was shown that the deceased fell from the dredge into the water when one of the fellow workmen noticed him sitting on the edge of the dredge with his head in his hands and asked him what was his trouble. It was held, in line with the great weight of authority, we believe, that there was ample evidence to support the judgment.

In the case of Texas Employers' v. Shipley, et al., 260 S. W., 646, our court quotes from 22 Corpus Juris, p. 84, Sec. 27, as follows:

> "An inference of fact should not be drawn from premises which are uncertain, but the facts upon which an inference may be legitimatley rest must, it is said, be established by direct evidence as if they were the very facts at issue. It follows that one presumption can not be based upon another presumption. It is, however, permissible for a court or jury to draw several conclusions or presumptions of fact from the same circumstances, and in order that a presumption may be indulged, it is not necessary to believe that the thing presumed has been actually done, but it is sufficient if the evidence leads to a conclusion that it may have been done, and that its

existence would be the solution of the difficulty arising from its non-existence."

In Clover, C. & Co. v. Hughes (1910) A. C. (Eng.) 242, 79 L. J. K. B. N. S., 470, 102 L. N. S., 340, 26 Times L. R., 359, 54 Sol. Jo., 375, 3 B. W. C. C., 275, 47 Scot. L. R., 885, upheld by the court of appeals and House of Lords, it was held that where a workman was suffering from an aneurism in such an advanced state that it might reasonably have been expected to burst at any time, and it did burst while he was tightening a nut, which caused a strain ordinarily in his work, that there was an accident within the meaning of the English Workmen's Compensation Act.

Our courts apply the rule that the appelate court must consider the evidence of the record most favorable for the plaintiff from the position of the injured party just before and at the time of the accident, Texas Emp. Ins. Assn. v. Davidson, 5 S. W., (2d), 1008. We believe that the undisputed evidence, concurred in even by the witnesses called by the defendant, that Hal Cook was an exceptionally healthy, robust and strong man at all times prior to the injury and even during the first two hours approximately that he worked, and further considering the uncertainty of the testimony of the record as to whether Hal Cook, while on the boat, stated he had hurt himself or was hurting, and considering further the fact that he had suddenly to stop work, feeling fainty, had to leave the place where he was working and go up on the deck of the ship, and considering that the lifting was exceptionally heavy and that the employees had to do their work in a bent-over position, there not being room to stand upright, and considering the fact that this man constantly thereafter had severe and excruciating pains, that no cocci of any kind and no disease of any kind was ever present, that he constantly had hemorrhage of the bowels and that he gradually wasted away and died; that the doctor that treated him from day to day and that actually made examinations of him could find no explanation whatever for his death other than a ruptured blood vessel, exactly in line with the history of the injury given by the deceased to his doctor, to-wit, that he felt something give way on the inside of him and

suffered pain and felt fainty while he was lifting a car axle, and considering all of the other facts and circumstances before the jury in this case, we believe that the preponderance of the evidence shows that Hal Cook ruptured a blood vessel which caused his death. We do not believe that any of the evidence adduced by the Appellant, practically all of which was based on hypothetical questions, gives any logical or reasonable theory for Hal Cook's death, and that the character of the evidence before the jury was such that it could and did reasonably satisfy the jury that Cook ruptured a blood vessel which caused his death. In this case there was no predisposition toward any disease whatsoever. Neither was there any sudden death such as frequently occurs from heart failure, paralysis, or appendicitis as the facts in many of the cases cited show, but all the symptoms as shown by the evidence of both parties show a gradual breaking down and wasting away of the deceased following the strain which he received on the boat.

It is very clear from a review of the foregoing Texas authorities and authorities in other states, particularly in cases where death has sealed the mouth of the injured, that where there has been a tearing, straining, severing or rupturing of internal organs of the body while the employee is engaged in his work and as a result of the heavy lifting or straining position of the employee engaged in such work, such severing, rupturing, tearing, or straining of any of the internal organs or tissues is an injury within the purview of the Workmen's Compensation Law. And we submit that the preponderance of credible testimony in this case unquestionably shows that Hal Cook died as a result of the rupturing of a blood vessel within his body, thereby gradually reducing his vitality until he died.

We have reviewed all the cases cited by the Appellant and have been unable to find therein any reason why this Court should disturb the finding of the jury and the judgment entered thereon in this case.

We submit that the explanation given by Dr. Barnes, the physician who constantly attended deceased and who called in other physicians to advise with him, is the only logical

and reasonable theory given as to the cause of Cook's death. We further submit that the jury in making its findings did not have to base any presumption upon another presumption, but had uncontradicted testimony which established facts to support any inferences they might have drawn. The circumstances proved in this case are so strong, and the doctor's opinion is so logical and based upon such undeniable facts, that we could not see how any reasonable man could have concluded differently from the jury's findings. Any inferences that the jury might have indulged in were based upon the undeniable facts concurred in by witness of the defendant, that the man was strong, healthy and robust up to the night of his injury; that deceased worked for about two hours in his usual manner; that after that the witnesses before the court who were working in the same hatch noticed him slack up on his work, heard his complaints as to terrific pains, saw him leave the hatch where he was working; that he went home ill and in terrific pain and continued to have such pains up to the time of his death; that he had frequent hemorrhages of the bowels; and that he finally died as a result of gradual wasting away of his blood.

CONCLUSION

We believe that the various specifications and propositions relied upon by Petitioner are without merit and that therefore the Writ of Certiorari for which it prays should be denied; and we furthermore believe that the findings of the jury and the judgment of the Honorable Trial Court and Honorable Circuit Court of Appeals are not only proper but subserve the ends of substantial justice; and we therefore pray that the Writ of Certiorari requested by the Petitioner be in all things denied.

Respectfully submitted,

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APPENDIX A

"Article 8306. Sec. 1. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense:

1. That the employee was guilty of contributory negligence.

2. That the injury was caused by the negligence of a fellow employee.

3. That the employee had assumed the risk of the injury incident to his employment; but such employer may defend such action on the ground that the injury was caused by the wilful intention of the employee to bring about the injury, or was so caused while the employee was in a state of intoxication.

4. In all such actions against an employer who is not a subscriber as defined hereinafter in this law, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment. ***

"Sec. 3. The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employee and their representatives and beneficiaries shall look for compensation solely to the association as hereinafter provided for. ***

"Sec. 3a. An employee of a subscriber shall be held to have waived his right of action at common law or under any

statute of this State to recover damages for injuries sustained in the course of his employment if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed said right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within five days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common law or under any statute may thereafter waive such claim by notice in writing, which shall take effect five days after its delivery to his employer or his agent. Any employee of a subscriber who has not waived his right of action at common law under any statute to recover damages for injury sustained in the course of his employment, as above provided in this section, shall, as well as his legal beneficiaries and representatives have his or their cause of action for such injuries as now exist by the common law and statutes of this State, which action shall be subject to all defenses under the common law and statutes of this State.

"Sec. 3b. If an employee who has not given notice of his claim of common law or statutory rights of action, or who has given such notice and waived the same, sustains an injury in the course of his employment, he shall be paid compensation by the association as hereinafter provided, if the employer is a subscriber at the time of the injury. *** (Sec. 3c provides for notices to be given in case employer ceases to be a subscriber.)

"Sec. 4. Employees whose employers are not at the time of the injury subscribers to the said association *** can not participate in the benefits of said insurance association, but they shall be entitled to bring suit and may recover judgment against such employers, or any of them, for all damages, sustained by reason of any personal injury received in the course of employment or by reason of death resulting from such injury, and the provisions of Section 1 of this law shall be applied in all such actions."

"Article 8309. Sec. 3. Any subscriber who has paid a premium as provided in Section 1, Part 4, of this law may, upon application to the Board and to the association and after show-

ing satisfactory to the Board that he has notified all of his employees, in such manner as may be required by the Board, cease to be a subscriber, and be entitled to a refund of the unearned portion of his premium, subject, however, to any rule approved by the Commissioner of Insurance as to the minimum premiums or short rate cancellation."

SUPREME COURT OF THE UNITED STATES.

No. 81.—October Term, 1929.

Employers' Liability Assurance Corporation, Ltd., of London, England, Petitioner,
vs.
Mrs. Myrtis Cook, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 14, 1930.]

Mr. Justice McReynolds delivered the opinion of the Court.

In January, 1927, while regularly employed by the Ford Motor Company and "open for any kind of work" Hal Cook was instructed as "a part of his contract of employment to assist in unloading cargo off" the steamship Lake Gorian, lately arrived at Houston, Texas, from the high seas and then tied up at the dock. While at work in the hold of the vessel he received serious injuries from which it is asserted he died March twenty-eighth.

The Ford Motor Company carried a policy of Workmen's Compensation Insurance with the petitioner—Employers' Liability Assurance Corporation, Ltd., of London, England, which undertook to protect the assured against loss by reason of injuries to its employees.

Purporting to proceed under the Workmen's Compensation Act of Texas respondents presented to the Industrial Accident Board a claim for compensation because of Cook's death against both the Motor Company and the insurer. This was denied upon the ground that the death "was due to a condition in no way incident to or associated with his employment." As permitted by the statute respondents refused to abide by the action of the Board and brought suit in the state court.

They alleged—"While in the course of his employment, said Hal Cook was instructed by said Ford Motor Company to assist in unloading a ship or vessel belonging to the said Ford Motor Company then anchored at the wharves at Houston Ship Channel at Houston,

Texas, and while so engaged said Hal Cook suffered severe injuries in that while he and other employees of the said Ford Motor Company were unloading from said ship the cargo thereon, consisting of axles and various other parts of automobiles and transferring the same to the wharves where said ship was anchored, the said Hal Cook while lifting said automobile parts, received a severe strain to the internal muscles of his back . . . ," which caused his death.

They asked for judgment setting aside the award of the Board and for compensation as provided by the statute.

The cause was removed to the United States District Court. It heard the evidence, denied a motion for an instructed verdict in favor of the petitioner, submitted the matter to a jury and upon a verdict in respondents' favor entered judgment. Appeal was taken to the Circuit Court of Appeals for the Fifth Circuit which held—"We think it fairly can be said that the matter of unloading these two ships of the Ford Motor Co. at rare intervals was 'of merely local concern, and its regulation by the state will work no material prejudice to any feature of the general maritime law.' "

The record plainly discloses that while in the course of his employment and at work in the hold assisting in unloading a vessel afloat on navigable waters Cook received injuries out of which this suit arose. There is nothing in principle to differentiate this case from *Northern Coal Company* v. *Strand*, 278 U. S. 142, and the judgment of the Circuit Court of Appeals must be reversed.

See *Nogueira* v. *New York, N. H. & H. R. R. Co.*, decided this day.

The proceeding to recover under the State Compensation Act necessarily admitted that the decedent was employed by the insured when injured. Any right of recovery against the insurance carrier depends upon the liability of the assured. Whether Cook's employment contemplated that he should work regularly in unloading vessels or only when specially directed so to do is not important. The unloading of a ship is not matter of purely local concern as we have often pointed out. Under the circumstances disclosed the State lacked power to prescribe the rights and liabilities of the parties growing out of the accident. The fact that the Compensation Law of the State was elective in form does not aid the respondents. The employer did not surrender rights guaranteed to him by

the Federal law merely by electing to accept one of two kinds of liability in respect of matters within the State's control, either of which she had power to impose upon him.

The judgment of the court below must be reversed. The cause will be remanded for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice STONE.

As the Court, in *Northern Coal & Dock Company* v. *Strand*, 278 U. S. 142, held that one engaged as a stevedore in unloading a ship lying in navigable waters is a seaman within the meaning of the Jones Act, 41 Stat. 1007, 46 U. S. C. A., § 688; *International Stevedoring Company* v. *Haverty*, 272 U. S. 50, and that by that Act Congress had occupied the field and excluded all state legislation having application within it, I am content to rest this case on that ground, see *Nogueira* v. *N. Y., N. H. & H. R. R.*, decided this day. But I do not agree that the present case is so exclusively controlled by the maritime law that workmen otherwise in the situation of respondent, but who are not seamen and therefore not given a remedy by the Jones Act, and who are not within the purview of the Employers' Liability Act, 35 Stat. 65, [45 U. S. C. A., § 51], are excluded from the benefits of a compensation act like that of Texas. The Court held otherwise in *Rosengrant* v. *Havard*, 273 U. S. 664, commented on in my opinion in No. 62, *John Baizley Iron Works* v. *Span*, decided this day.

The present case arose before the effective date of the Longshoremen's and Harbor Workers' Act, 44 Stat. 424 [33 U. S. C. A., §§ 901, 950]. But the remedies given by that Act are withheld where recovery may be had under local compensation acts, and not all persons engaged in unloading a vessel are entitled to recover under it, even though without remedy under local compensation laws. See § 3 (a) [33 U. S. C. A., 903 (a)].

Mr. Justice HOLMES and Mr. Justice BRANDEIS concur.